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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

J.D. Hopkins,
Petitioner

v.

D.C. Chapman Ventures, Inc.
Respondent

On Petition for Writ of Certiorari to the Circuit Court of Nicholas County, West Virginia

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In a bench trial of the subject property line dispute, Circuit Judge Gary L. Johnson ruled against senior deed holder Petitioner-defendant Hopkins in favor of junior deed holder Respondent-plaintiff Chapman. In ruling for Respondent, Judge Johnson (a) limited Petitioner's twenty years of adverse use to the oddly shaped Encroachment Tract manufactured by Respondent's expert in 2005 for the subject litigation; (b) found that the hotly contested location of the Duffy Lane intersection had been moved prior to or in 1945 "based most[ly] on Charlie Hinkle's testimony" because "Mr. Hinkle testified he's the one who moved the road," despite the fact that Charlie Hinkle was born in 1938 and could not have "moved the road" in 1945 because he was only six years old; (c) found for Respondent's survey requiring Petitioner Hopkins to own the land on which Duffy Lane is currently located, despite sworn statements in lawsuits in 1991 and 2004 by adjoining Peck Tract owners claiming that they own the land on which Duffy Lane currently resides – some of the statements made *before Judge Johnson* while the Pecks *were represented by opposing counsel Greg Sproles*; and (d) corrected a fatal flaw in Respondent's case by rejecting two completed surveys of the Hopkins senior deed to credit instead the conclusory testimony of surveyor Wayne Acord who was injected into the litigation just weeks before trial by Respondent. Judge Johnson's findings on these critical issues were clearly erroneous and he abused his discretion in weighing the evidence presented at trial. Moreo-

ver, the only judicial review of the bench trial verdict was performed by Judge Johnson as the West Virginia Supreme Court of Appeals denied Petitioner Hopkins' petition for appeal. The questions presented are:

(1) in a bench trial, does the West Virginia state court system provide the meaningful judicial review required by the Due Process Clause of the Fourteenth Amendment when the only review performed is by the trial judge that made the factual determinations and associated rulings;

(2) whether Petitioner-defendant Hopkins was denied the due process afforded by the Fourteenth Amendment due to lack of a "neutral and detached" judge in view of the extreme measures Judge Johnson was willing to take in ruling for Respondent Chapman and the failure of the West Virginia Supreme Court to grant review of the clearly erroneous rulings; and,

(3) are Judge Johnson's findings clearly erroneous requiring reversal of the verdict?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties named in the caption are the only parties in the case.

No Rule 29.6 Statement is required as Petitioner Hopkins is an individual.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner J.D. Hopkins respectfully submits this petition for a writ to review the judgment of Judge Gary L. Johnson in Civil Action No. 05-C-195 from the Circuit Court of Nicholas County, West Virginia.

## OPINIONS BELOW

The Orders of the Circuit Court of Nicholas County, West Virginia, attached hereto at Appendix A at A1 and Appendix B at A41, are not reported. The Order of the West Virginia Supreme Court of Appeals denying Petitioner's appeal petition, referenced as Case No. 08-2078 and attached hereto at Appendix C at A46 is not published.

## JURISDICTION

The Supreme Court of Appeals of West Virginia denied review on February 26, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. XIV § 1.

## STATEMENT

### I. CASE/PROCEDURAL HISTORY

The subject civil action arose as a result of a Complaint filed by the Respondent-plaintiff to establish a boundary line between its property and the property of the Petitioner-defendant pursuant to West Virginia Code § 55-4-31. Petitioner-defendant J.D. Hopkins purchased his 24-acre tract, part of which serves as a motel business, in 1965 ("the Hopkins Tract"). At the time of the filing of the Complaint, Respondent-plaintiff D.C. Chapman Ventures, Inc. ("Respondent" or "Chapman") was a lessee of property adjoining the eastern boundaries of the Hopkins Tract owned by Judith Young ("the Chapman Tract") with a right to purchase which Chapman later exercised. *See* Complaint at 5-6. J.D. Hopkins' source of title (dating back to 1934) is senior to the grant under which plaintiff Chapman claims title. Chapman and Judith Young filed suit on October 19, 2005 in the Circuit Court of Nicholas County against J.D. Hopkins and David Hopkins alleging the encroachment and trespass by defendants along the eastern boundary of the Hopkins Tract. Judith Young and David Hopkins were dismissed from the case prior to trial. Circuit Judge Gary L. Johnson presided over a five-day trial taking place on September 19-20 and October 10-12, 2007, viewing the disputed property, Duffy Lane, and other relevant landmarks on the first day. On December 5, 2007, Judge Johnson issued an order finding that a survey performed by Craig Dunlap of the junior deed Chapman Tract most accurately represented the disputed boundary line and that defendant J.D. Hopkins had adversely possessed property bounded

by the "Encroachment Tract" shown on the Dunlap survey, and requiring J.D. Hopkins to obtain a further survey of the "Encroachment Tract." *See* App. A at A1, Order Following Bench Trial Establishing Real Estate Boundaries dated December 5, 2007 ("Trial Order"). On December 17, 2007, J.D. Hopkins filed a Motion For New Trial, Or In The Alternative, Motion To Alter or Amend Judgment Or Make Additional Findings of Fact ("Motion"). A hearing on the Motion occurred on February 19, 2008 ("February Hearing") with Judge Johnson reaffirming the Trial Order and elaborating on the rationale for his findings. On May 19, 2008, Judge Johnson entered an Order explicitly adopting the rationale as stated during the February Hearing, noting the filing of the associated transcript ("Hearing Trans."), and attaching a partial copy of Plaintiff's Exhibit No. 1 showing the "Encroachment Tract." *See* App. B at A41, Order Denying Defendant's Motion For New Trial, Or In The Alternative, Motion To Alter or Amend Judgment Or Make Additional Findings of Fact And Order Reflecting Ruling On Other Post Trial Motions ("May Order"). Petitioner-defendant petitioned the West Virginia Supreme Court for review of Judge Johnson's Orders in September 2008. The West Virgina Supreme Court denied the petition on February 26, 2009. *See* App. C at A46. Petitioner-defendant Hopkins seeks review of Judge Johnson's Orders, as well as the denial of Petitioner's appeal petition by the West Virginia Supreme Court of Appeals, in the subject petition for the reasons stated herein.

## II. THE SENIOR DEED HOPKINS TRACT AND ADJOINING PROPERTIES

The relevant properties are identified in red on the annotated plat of surveyor Kevin Schafer (Def. Ex. 2). *See* Appendix D at A48. The senior deed Hopkins Tract was conveyed originally by deed in 1934. *See* App. A, Trial Order at A3, ¶2; Pl. Ex. 5. Prior to that time, the Hopkins Tract, the 1968 Taylor Tract, the 1946 Taylor Tract, and the Chapman Tract were part of an 872.5-acre tract belonging to James Craig, et al. (collectively, the "Common Grantor"). *See* App. A, Trial Order at A3-A5, ¶¶1-2, 6. The 1946 Taylor Tract was conveyed in 1946 to Ben and Freda Taylor. *Id.* at 5, ¶6a. The 1968 Taylor Tract, conveyed in 1968 to Ben and Freda Taylor, was conveyed originally by deed in 1963 ("The 1963 Deed") to James Ireland. Def. Ex. 21 (DB 204/105). The 1963 Deed also conveyed the Chapman Tract (purchased by Chapman in 2006) to James Ireland. *Id.* The disputed property line is the eastern boundary of the Hopkins Tract as it joins the Chapman Tract and the 1968 Taylor Tract. Also of relevance is the Peck Tract adjoining the southern boundary of the Hopkins Tract along Duffy Lane. PL. Ex. 23 (DB 94/27); Def. Ex. 11 (DB 34/486).

## III. JUDGE JOHNSON'S CLEARLY ERRONEOUS DUFFY LANE MOVEMENT FINDING.

As the Trial Order explains

> [t]he boundaries at issue in this case are controlled by the description in the 1934 Snodgrass Deed, which originally con-

> veyed the current Hopkins property. This deed calls for a 635-foot border along Federal Route 19 (now W.Va. Route 41) but there is a dispute among the surveyors as to where the 635-foot line begins. The primary reason for the dispute is that the Snodgrass Deed describes the beginning point of the survey as being at the north edge of Duffy Lane . . . [with] plaintiff contending that the north edge of Duffy Lane in 1934 was a significant distance from its present-day location [w]hereas, the defendant contends that Duffy Lane has remained essentially unchanged since 1934.

*See* App. A, Trial Order at A11-A12. An aerial photograph of Duffy Lane taken in 1945 (Pl. Ex. 11) shows that Duffy Lane curved left prior to its intersection with Route 19. *See* annotated path "B" in reproduced partial of photograph at Appendix E at A49. To reconcile this curve with his expert's survey of his junior deed ("Dunlap survey"), respondent Chapman argued that in 1934, when the Hopkins Tract was originally conveyed, Duffy Lane did not curve to the left as shown in the 1945 photo but ran perpendicularly to Route 19 to form their intersection (i.e., along annotated path "A"). *See* App. D *at* A48 (annotated Schafer plat (Def. Ex. 2) showing the boundary line advocated by the Dunlap survey running straight out of Duffy Hollow instead of curving left as shown in the 1945 aerial photograph). Chapman further contended that as late as 1945 Duffy Lane was modified to shift the entire intersection northward to the point shown in the 1945 aerial photograph. *See* App. A, Trial Order at A19-A20.

Judge Johnson agreed with Respondent Chapman and explained that his findings regarding the Duffy Lane movement, and accordingly the Dunlap survey advocated by Respondent Chapman, were based mostly on the testimony of Charlie Hinkle:

> *The Court would find, again, that Duffy Lane moved*, as stated in the findings of fact; and it's interesting because ***I based most of that finding on Charlie Hinkle's testimony***. I think Mr. Hinkle testified he's the one who moved the road; and the very last thing he said on the stand, if I remember correctly, was, "Well, the whole thing moved." Because you kept asking him 'did the south point move; did the south point move,' and he said the whole thing moved. *Mr. Hinkle's testimony was* ***very critical*** *in my decision* ***as to where to place Duffy Lane, the beginning of the survey.*** So, the Court would find that there's sufficient facts to support the Court's finding that was previously made in this matter. The Court would find that there is substantial evidence to support the Court's finding that the road was straight up at the time that the deed was – the original description was made; and that, again, the movement of Duffy Lane made a difference as to where the beginning of the survey was.

Hearing Trans. at 48-49 (emphasis added). That Judge Johnson "based most" of the Duffy Lane

movement finding on Mr. Hinkle's "critical" testimony shows that the finding is clearly erroneous. Mr. Hinkle was born in 1938 and was incapable of moving the road in 1945 as he was only six years old.[1] Moreover, Mr. Hinkle testified that he has only lived around Nicholas County since 1946 and that he only knew about Duffy Lane after 1945.[1,2] Accordingly, Mr. Hinkle's testimony can only reflect the layout of Duffy Lane as illustrated in the 1945 aerial photograph. As shown at App. E at A49, in this photograph Duffy Lane does not run perpendicularly to Route 19 to form their intersection as required by the Chapman position and the Dunlap survey but instead curves to the left to run more or less "parallel with [Route 19]" to form their intersection, supporting J.D. Hopkins' position and the Schafer survey.[3,4] As Judge Johnson found Mr. Hinkle's testi-

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[1] Tr. Trans. Sept. 19, 2007 at 238 ("Q. How old are you? A. Sixty-nine. Q. How long have you lived around Nicholas County. A. Since 1946.").

[2] Tr. Trans. Sept. 19, 2007 at 245-46 ("Q. Now, you weren't in Duffy Lane before 1945, were you? A. No, sir, I wasn't. . . . Q. All you know what was there when you were there after'45 at some point. A. Yes sir.")

[3] Tr. Trans., Sept. 19, 2007 (Charlie Hinkle) at 244 (describing Duffy Lane "in the '50 and '60s") (Q. When you got past that tree and went to 41, what did it do? What did the road do? A. It beared south, and it turned there and went up *parallel* with 41) (emphasis added); see also *id.* at 245 (Q. Is it fair to say that you actually made the road that we're looking at today as Duffy Lane? A. Other than putting gravel on, probably so."); at 248 (Q. Regardless of whether we're talking the north side or south side of the road, the whole road moved north? A. Yes sir. Yes sir, it did because *there was no room to move south because right there's 41*, and *you're right under it*.").

[4] Moreover, consistent with that shown in the 1945 aerial photograph and contrary to the implication of Judge Johnson's "whole road" statements, Charlie Hinkle did not testify that the

mony "very critical as to where to place Duffy Lane, the beginning of the survey," Judge Johnson's finding for the Dunlap survey "based most[ly]" on Mr. Hinkle's testimony is clearly erroneous.

## IV. JUDGE JOHNSON'S ABUSE OF DISCRETION IN IGNORING PRIOR LAWSUITS IN WHICH OPPOSING COUNSEL ARGUED THAT THE PECKS, NOT PETITIONER HOPKINS, OWNED THE PROPERTY ON WHICH DUFFY LANE CURRENTLY RESIDES

Respondent-plaintiff Chapman's position requires Petitioner Hopkins to own the land on which Duffy Lane is currently situated. *See* App. D at A48 (annotated Schafer Plat showing Dunlap Survey line allocating Duffy Lane to Hopkins Tract). However, Rachel Peck and her heirs ("The Pecks") -- owning the adjoining property along the southern Duffy Lane boundary of the Hopkins Tract -- claimed to own the property upon which Duffy Lane is currently situated in lawsuits filed in 1991 and 2004. In response to a declaratory judgment action filed in 1991 by Donny and Denise Donelson regarding their access to Duffy Lane, Rachel Peck claimed (with sworn statement) to own the property upon which Duffy Lane was situated at that time:

> Interrogatory No. 3: Do defendants Landers or any other defendants named herein claim ownership of the roadway the subject of this proceeding and identi-

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"whole" Duffy Lane intersection moved but only that the north side of the intersection moved as "there was no room to move south because right there's 41" (formerly Route 19). *See* n. 3.

> fied herein as "Duffy Lane"? If so, what is their specific source of title?
>
> Answer: Yes. Defendant, Rachel Peck, claims ownership of the property upon which the subject roadway known as "Duffy Lane" is situate by virtue of a Deed from James Peck dated the 31st day of March, 1967, and of record in the office of the Clerk of the County Commission of Nicholas County, West Virginia, in Deed Book 220 at page 348.

Def. Ex. 14 (Civil Action No. 91-C-277). The Peck successors made the same claim to the Duffy Lane property thirteen years later. In 2004, Ann Peck Landers and Sheldon Landers filed suit against *Petitioner Hopkins* claiming (with sworn statement) that "[t]he Plaintiffs are also the actual owners of the real estate upon which Duffy Hollow Lane or Duffy Lane is located." Def. Ex. 13 (Civil Action No. 04-C- 77). In both lawsuits, the Pecks were represented *by opposing counsel Greg Sproles*. *See,* Def. Exs. 13-14. Moreover, *Judge Johnson* presided over the 2004 suit against Petitioner Hopkins, which was settled just months prior to the filing of the subject suit in which counsel Sproles on behalf of respondent Chapman claimed the exact opposite – that *Petitioner Hopkins*, not the Pecks, owns the property on which Duffy Lane is currently located. *See* Def. Ex. 13. Judge Johnson abused his discretion by ignoring the prior Peck claims to Duffy Lane. Moreover, by ignoring the prior Peck claims and the associated representations of opposing counsel Greg Sproles, Judge Johnson effectively allows the shifting of the property lines of Petitioner Hopkins depending on

which side of Mr. Hopkins' boundary lines Mr. Sproles' current client adjoins (i.e., shifting the Hopkins boundary line northward of Duffy Lane when representing the Pecks and southward encompassing Duffy Lane when representing Chapman).

## V. JUDGE JOHNSON'S REJECTION OF THE ONLY COMPLETE SURVEYS OF THE HOPKINS SENIOR DEED IN FAVOR OF CONCLUSORY STATEMENTS SUPPORTING RESPONDENT CHAPMAN'S POSITION.

Three complete surveys were performed for the subject litigation. Surveyors Schafer and Robinson provided complete surveys (report and plat) of the Hopkins *senior* deed while surveyor Dunlap provided a complete survey (report and plat) of the Chapman *junior* deed. Def. Exs. 2,9; Pl. Ex. 13. The Schafer and Robinson senior deed surveys were commissioned by petitioner-defendant J.D. Hopkins and then-defendant David Hopkins respectively with the junior deed Dunlap survey commissioned by respondent-plaintiff Chapman. *Id.* In rendering its decision for Respondent-plaintiff Chapman, the trial court dismissed the two complete Hopkins senior deed surveys to credit instead Wayne Acord's testimony regarding a *preliminary* survey of the Hopkins Tract Mr. Acord allegedly performed in 1999. The trial court credited "Mr. Acord's testimony because he didn't have anything in this. He was an impartial witness, a third party; and his testimony tended to support Mr. Dunlap's survey, and that's why I credited that testimony more than I did the other two surveyors." Hearing Trans. at 49-50. However, Wayne Acord was not an "impartial witness" but an

advocate needed by *junior deed holder plaintiff* Chapman to facially meet his burden of establishing the Hopkins senior deed boundary lines. Moreover, Acord's testimony regarding *his* 1999 preliminary analysis of the 1934 Hopkins senior deed consisted wholly of his *discovery* of a stake placed in *1968* with the conveyance of the 1968 Taylor Tract adjoining the Hopkins Tract along the disputed boundary line. Given Acord's conclusory testimony, the trial court's finding based thereon that the Dunlap junior deed survey more accurately reflects the Hopkins senior deed boundary lines is clearly erroneous. Further, the trial court abused its discretion in weighing the survey evidence, and also to the extent the court based its decision on Mr. Acord's status as an "impartial witness" instead of Mr. Acord's substantive testimony.

### A. Wayne Acord Was Not An "Impartial Witness" But A *Necessary* Advocate For Plaintiff Chapman.

Wayne Acord was injected into this litigation nearly two years after the filing of the complaint and only weeks prior to trial *by respondent-plaintiff Chapman* specifically to testify to the Hopkins senior deed boundary lines. Because the present case is one of adjoiner and the petitioner Hopkins' source of title is senior to the grant under which respondent-plaintiff Chapman claims title, "it is necessary for plaintiff, in order to prevail, to establish the lines of the [more senior Hopkins Tract], which adjoins its lines at the points in controversy." *West Virginia Pulp & Paper Co., v. J. Natwick & Co.*, 123 W.Va. 753, 757 (1941). Thus, this case is "one in which plaintiff has the burden not only of proving title

upon its own strength but also by establishing defendant's adjoining lines." *Id.* Without the testimony of Wayne Acord, respondent-plaintiff Chapman had no survey of the Hopkins senior deed that supported its position. Belatedly injected into this litigation by respondent Chapman to testify regarding a *preliminary* survey of the Hopkins senior deed, Wayne Acord was not a "disinterested party," but a *necessary* advocate for respondent.

### B. Acord Based His Opinion On The Location Of The Disputed Boundary Line For The 1934 Hopkins Senior Deed Wholly On His Discovery Of A Corner Stake Placed Per The 1968 Conveyance Of The 1968 Taylor Tract.

The 1934 Hopkins senior deed references three monuments in defining the 635-foot boundary line segment along Route 19 that determines the Hopkins-Taylor/Chapman boundary line at issue: (1) the north side of Duffy Lane, (2) Route 19; and (3) "a stake 2.5 feet southwest from center of telephone pole." *See* App. A at A6, Trial Order at ¶ 9; Pl. Ex. 5. During the trial, Mr. Acord provided little substantive detail of his alleged efforts and analyses in preliminarily surveying the 1934 Hopkins senior deed. In fact, Mr. Acord provided no substantive detail regarding *his 1999* preliminary findings for any boundary line of the Hopkins Tract *except* the Hopkins-Taylor/Chapman boundary line at issue. Mr. Acord specifically testified that he did not know where Duffy Lane resided in 1934 and that he had no opinion about the location of the Hopkins Tract corner at the

north side of Duffy Lane.[5,6] He also testified that he never analyzed the location of Route 19 as it existed in 1934.[7] With respect to the disputed Hopkins-Taylor/Chapman boundary line, Mr. Acord testified that during his survey of the Peck Tract in 1983 he *found* the corner stake placed *in 1968* in conjunction with the conveyance of the 1968 Taylor Tract from James Ireland to the Taylors and that in his opinion the Hopkins-Taylor/Chapman boundary line was "right where we found the corners in 1983 . . . which corresponds to Craig Dunlap's survey."[8] Notably,

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[5] Tr. Trans. Oct. 10, 2007 (AM) at 154 ("Q. You did not attempt to locate Duffy Lane in 1934 or 1911 or anything of that nature? A. At the time we were doing that, we didn't feel there was an issue with Duffy Lane; and we located actually where it was in 1983."); at 183-84 ("Q. Yeah, I understand. But wherever Duffy Lane sat in '38, that 31/2-4 acre tract was conveyed based upon the way Duffy Lane sat in '38. A. Yes. Q. Not '34? A. Well, I don't know where it was in '34 or '38. Q. You don't really know where it was in '34, do you? A. No.").

[6] Tr. Trans. Oct. 10, 2007 AM at 164-65 ("The Court: Have you formed an opinion as to where that is? The Witness: As far as the corner at the north side of Duffy Lane? The Court: Yes. The starting point of the description, yes. Have you, based on what everything you've done, formed an opinion about that yet? The Witness: Not exactly, no. I mean, there's a lot of different variables to look at here.")

[7] *Id.* at 197-98 ("Q: Federal Rt 19, would that also be a monument? A: That could be a monument as it is today. Q: Wherever it was in '34, it would have been a monument. Is that right? A: If you could probably generate where it was. Q: You didn't undertake that analysis, did you? A: No. I didn't think it was necessary. Q: But that was a monument called for in Mr. Hopkins' chain-of-title? A: Yeah.").

[8] Tr. Trans. Oct. 10, 2007 AM at 165-66 ("THE COURT: So, then my question to you, then, have you formed an opinion as to the boundary line between the Taylors and the Mountain State property at this time? THE WITNESS: Yes. THE COURT: And where do you think that boundary line is? THE

Mr. Acord did not testify that he performed any analysis to determine the accuracy of the placement of the Taylor corner stake. Other than the above testimony, Mr. Acord provided no detail (substantive or otherwise) regarding *his* 1999 preliminary findings for the Hopkins senior deed.

### C. Acord's Testimony Relied Upon By The Trial Court Contradicts The Remaining Surveyors' Opinions Of The Hopkins Tract Boundary Lines.

In relying on Wayne Acord's testimony, the trial court also explained that

> I went back and read the transcript when I received these; and Mr. Acord, when asked the hypothetical question, said something along the lines, "Sure, if you agree with A, B and C, then I would agree with you, but I don't agree with A, B and C," or something along those lines. I found Mr. Acord, of the surveyors, his testimony to be the most credible of the surveyors who testified in this matter; and his testimony supported the Dunlap survey.

Hearing Trans. at 50. The points referenced are B, C, and D of the Hopkins Tract illustrated on the an-

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WITNESS: In my opinion, it's right where we found the corners in 1983 and which - THE COURT: Which would correspond with this survey right here? THE WITNESS: -which corresponds to Craig Dunlap's survey").

notated Schafer plat, *see* App. D at A48, (these points also bounding the Meadows Tract):

> Q But, if they are right, if B, C, and D are right, -- I understand you say you don't think you should do that; I'm asking you to assume B, C, and D are right. If they are right, whose line is right -- Dunlap's, Marshall Robinson's, or Kevin Schafer's?
>
> A Well, sure, if you -- All you're doing is taking the deed and swinging it. So, if you hold to them upper points and lay the line out, on the deed on that side, it would match his.
>
> Q "Match his" being Kevin Schafer's?
>
> A Yeah, but it wouldn't match on the other side.
>
> Q But it would match Kevin Schafer's?
>
> A That's what I just said.

Tr. Trans. Oct 10 AM (Acord) at 194; *see also id.* at 171. Notably, while Mr. Acord does not agree with points B, C, and D, the three remaining surveyors do. Significantly, Mr. Dunlap was involved in the effort that set these points during a survey of the adjoining Meadows Tract:

> Q Now, I just want to clarify. The points in the back that you said that you helped your dad survey with, and it would have been the Kenton Meadows tract, –

A I done the mapping work on it.

Q You did the mapping work on it?

A Yes.

Q Do you know if any of the other surveyors disagree with you on those three points?

A From what I've seen, they agreed other than this point here (indicating). They say it's 2.4 foot offline or something like that.

Q If that is 2.4 feet offline, will that affect where it ends up down here much?

A No, it should not.

Tr. Trans. Sept. 19, 2007 (Dunlap) at 69-70; see *id* at 18 (Dunlap's father set points). Accordingly, as the "A, B, and C" testimony relied upon by the trial court does not support the opinions of Craig Dunlap and is in direct conflict therewith, it is impossible to reconcile the same. Further, to the extent that Dunlap's opinion regarding these points is correct, Acord has testified that the *Schafer* survey governs. The trial court abused its discretion and is clearly erroneous in finding otherwise.

## VI. JUDGE JOHNSON'S CLEARLY ERRONEOUS FINDING LIMITING PETITIONER'S ADVERSE POSSESSION TO THE "ENCROACHMENT TRACT" ORIGINATING WITH AND DEPICTED ON THE DUNLAP SURVEY PLAT. TRIAL ORDER AT ¶ 23.

Judge Johnson found that Petitioner Hopkins had adversely possessed "an area around the 40s Building, designated on the Dunlap Survey . . . as the 'Encroachment Tract.'" Judge Johnson focused on the 1994 video taken by Martha Hopkins to determine the area adversely possessed by Petitioner Hopkins. In the Trial Order, Judge Johnson explained:

> [t]he existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994. Specifically, *the video depicted an area the size of a single lane roadway, or about 10 feet wide*, on the east side of the 40s Building leading toward the rear of the building.

App. A, Trial Order at A32. During the February 2007 Hearing regarding a motion for new trial, Judge Johnson further explained that he:

> went back and watched the 1994 video again. It looked like to me from that video that the disturbed land was a little more than the size of an automobile. And so, I credited that with two or three extra feet. You argued the '94 video, but that's what I looked at when I decided how many feet to

> the side of that building that was used by the Defendants in this case. I mean, somebody can look at that and maybe reach a different result, but that's the result I get from looking at the 1994 video.

Hearing Trans. at 51-52 (emphasis added). However, Judge Johnson's finding that the area adversely possessed is "about the size of a single lane roadway, or about ten feet" or "a little more than the size of an automobile" *based* on the 1994 video is clearly erroneous as evidenced by Picture 56 at Appendix F at A50 (annotated Def. Ex. 1) (1994 video extract) showing that almost a decade after Petitioner Hopkins built the Forties Building in 1985 (near the end of the adverse possession statutory period), Petitioner Hopkins used/ maintained at least 55 feet to the right of the 40s Building as a customer/parking area for his motel business.[9] *See* Tr. Trans. Oct. 10 at 88-89; Oct. 11 at 196-97 (Hopkins family testifying that more than 55 feet to the right of the Forties Building has been used and maintained for the motel business since 1985). Other evidence showing that the subject finding is clearly erroneous includes the 2007 ground evidence shown in Picture 76 at App. F at A50 (annotated Def. Ex. 1) showing (1) that the land is level from the paved and graveled area directly in front of the Forties Building all the way across the disputed area to the slope of the hill created by Chapman, supporting the testimony of all

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[9] Martha Hopkins testified she measured the distance between doors as "10 feet" and applying the measurement to Picture 56 to see the number of times it "falls within the right side of the building to the end of where the fallen tree is" tells the distance between the end of the Forties Building and the end of the fallen tree (i.e., "fifty-five feet"). Tr. Trans., Oct. 10 at 86-89.

three Hopkins family members that the whole area was built up and leveled during the construction occurring in the 1970's; and (2) a gradual change from a mostly graveled area to a mostly grassy area with gravel seen throughout the grass, supporting J.D. Hopkins' testimony that he spread "smaller gravel" over the entire area during the 1970's construction. Tr. Trans. Oct. 12 at 20. Other significant ground evidence ignored by the court includes the existence of a second set of concrete slabs placed by J.D. Hopkins during the 1970's construction along the stream bank *twenty feet beyond* the Hopkins-Taylor/Chapman boundary line of the Dunlap survey, the slabs existence confirmed by Craig Chapman. *Id.* Oct. 10 at 69; Oct. 12 at 103-104.

That the adverse possession finding is clearly erroneous is also readily evident from the fact that it limits the adverse possession to the Encroachment Tract (red/yellow areas) identified in and originating with the Dunlap Survey. *See* Appendix G at A51 (annotated attachment to the May 19, 2008 Order (Pl. Ex. 1- partial)). As shown in Pictures 56 and 76 (App. F at A50), nothing on the ground limits or impedes the Hopkins' use of the disputed property to the Encroachment Tract or even differentiates the Encroachment Tract from the surrounding disputed property. As Judge Johnson found that Petitioner Hopkins had adversely possessed area to the right of the Forties Building, that holding should not be limited to the oddly shaped Encroachment Tract created by Respondent's expert in 2005, but should extend to the entire area used for the Hopkins business since 1985 (at least the red and blue areas), that property naturally bounded by the stream and

tree line as explained by the Hopkins family and supported by the objective evidence. [10]

Finally, Judge Johnson also credited the testimony of two interested fact witnesses:

> [i]n addition to the video and photographic evidence, a nearby landowner, Doug Vincent, credibly testified that, as early as 2004, the area around the 40s Building was "grown up" with dense brush except for "about 10-15 feet off of the building. Craig Chapman convincingly corroborated this testimony by indicating he made similar observations when he first viewed the property around that same time frame.

*See* App. A, at A33. However, the ten year statutory period for adverse possession ended within a year of the taking of the 1994 video *relied upon by Judge Johnson*. At the end of the statutory period, J.D. Hopkins obtained title to the property used and maintained as shown in Picture 56 (at least 55 feet to the right of the Forties Building) and such title once obtained could only be destroyed by further adversary possessions. *Parkersburg Industrial Co. v. Shultz*, 27 S.E. 255, 256 (1897). Accordingly, even had the Vincent and Chapman statements been true,

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[10] Judge Johnson further abused his discretion by requiring Petitioner Hopkins to obtain further survey to document formally the "Encroachment Tract" boundary line explicitly depicted on the Dunlap survey. Trial Order at 39. Neither party requested this relief and the Trial Order together with the Dunlap survey provide sufficient documentation to reflect the boundary line judgment. This Order should be set aside.

the 2004 property conditions *per se* cannot defeat the title J.D. Hopkins acquired by adverse possession almost a decade earlier. Judge Johnson's finding to the contrary is wrong as a matter of law.[11]

## REASONS FOR GRANTING THE PETITION

### I. JUDGE JOHNSON'S FINDINGS ARE CLEARLY ERRONEOUS AND DEPRIVE PETITIONER HOPKINS OF REAL PROPERTY THAT HE HAS OWNED, ALTERED, AND MAINTAINED FOR MORE THAN FORTY YEARS.

As outlined in Sections III-VI above and Section II below, Judge Johnson's factual findings in the subject case are clearly erroneous. As a result of these findings, Petitioner Hopkins has been deprived, not of money damages, but of irreplaceable real property that he has owned, altered, and maintained exclusively for one-half of his 88 years of life. The importance of this property to Petitioner Hopkins and his desire for justice is evidenced by his pursuit of relief through the expensive and stressful process that ends with this Court. Petitioner is mindful that this Court rarely reviews clearly erroneous cases. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misap-

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[11] Other adverse possession/prescriptive easement rulings are also clearly erroneous. For example, Judge Johnson conveys to Respondent Chapman a road created by, and exclusively used and maintained by, Petitioner Hopkins since the early 1970s and the surrounding property used by Petitioner for at least the requisite statutory period to house pets as evidenced in the 1994 video.

plications of a properly stated rule of law."). However, this Court should examine those rare cases when even the simplest of issues deprives citizens of basic fundamental rights. The subject case presents this Court with the opportunity to recognize the struggles of Mr. Hopkins to protect his property rights and to remedy the wrongs committed upon him.

## II. THE EXTREME MEASURES TAKEN BY JUDGE JOHNSON IN RULING FOR RESPONDENT CHAPMAN DENIED PETITIONER HOPKINS THE UNBIASED JUDGE ESSENTIAL TO DUE PROCESS

A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. Of Monroeville*, 409 U.S. 57, 62 (1972). Not only are the trial court's rulings clearly erroneous as explained, but the extreme positions Judge Johnson took evince more than simple misunderstanding of the evidence presented at trial:

- The record evidence shows that the disputed area to the right of the Forties Building (prior to modification by Chapman) was naturally bounded by a stream and tree line. *See supra* at VI; App. F at A50. Nothing tangible on the ground limited Petitioner's (adverse) use of this disputed area (since at least 1985 at the time of the building of the Forties Building) to the oddly shaped Encroachment Tract manufactured by Respondent's expert in 2005 for the subject litigation. *Id.* Nothing tangible on the ground even differentiates the Encroachment Tract

from the surrounding disputed area. *Id.* The trial court's willingness to limit Petitioner's twenty years of adverse use to Respondent's 2005 Encroachment Tract reflects an unfair bias.

- Prior to the filing of the subject suit, opposing counsel Greg Sproles had maintained in two separate lawsuits, filed more than a decade apart, that the Pecks own the property on which Duffy Lane is currently situated and supported that position in both suits through sworn statements from the Pecks explicitly stating such ownership. *See supra* at IV. In the most recent Peck suit, filed in 2004 *against Petitioner Hopkins*, counsel Sproles made the Pecks' claim to *Judge Johnson*. Within months of settling the 2004 suit, opposing counsel Sproles filed the subject suit on behalf of Respondent Chapman and claimed the exact opposite position before Judge Johnson --that Petitioner Hopkins, not the Pecks, owns the land on which Duffy Lane is currently situated. Although noting in the Trial Order that "[t]he Court must . . . consider circumstantial evidence to determine the starting point of the 1934 Snodgrass Deed, or the north edge of Duffy Lane, in order to determine the correct placement of the Hopkins Tract's 635-foot boundary line," in ruling for Respondent Chapman, the trial court made no reference to the Peck claims directly relevant to the location of the Hopkins Tract adjoining the Peck property along Duffy Lane. Again, no legitimate rationale can be advanced for the trial court's failure to consider the Peck claims to Duffy

Lane. Moreover, as stated above, by ignoring the Peck claims and the associated representations of opposing counsel Greg Sproles, Judge Johnson effectively allows the shifting of the property lines of Petitioner Hopkins depending on which side of Mr. Hopkins' boundary lines Mr. Sproles' current client adjoins (i.e., shifting the Hopkins boundary line northward of Duffy Lane when representing the Pecks and southward encompassing Duffy Lane when representing Chapman). Again, such action reflects an unfair bias.

- By rejecting the two complete surveys of the Hopkins senior deed to credit instead the conclusory opinion of belatedly injected surveyor Wayne Acord, Judge Johnson corrected the fatal error in Respondent-plaintiff Chapman's case – respondent's failure to prove as a *junior deed holder plaintiff*, not only its title upon its own strength, but also *to establish Petitioner-defendant Hopkins' adjoining senior deed boundary lines*. In pursuing its claim, Respondent Chapman had commissioned only a survey of his junior deed (i.e., the Dunlap Survey). Further, neither of the two senior deed surveys commissioned for the subject litigation supported Respondent's position. Respondent needed Wayne Acord to establish (at least facially) his case. Knowing (1) that Respondent Chapman had a duty to prove Petitioner's senior deed boundary lines, (2) that the two completed senior deed surveys failed to support Respondent's position, and (3) that *Respondent* had called Wayne Acord as a witness, Judge Johnson's characterizing of Wayne Acord as "an

impartial witness, a third party" and crediting Mr. Acord's "testimony because he didn't have anything in this" protests too much. Moreover, Mr. Acord provided no substantive analysis of the Hopkins senior deed. Instead, he testified that he did not know where Duffy Lane resided in 1934 when the Hopkins Tract had been created by deed; that he had no opinion about the location of the Hopkins Tract corner at the north side of Duffy Lane; and that he never analyzed the location of Route 19 as it existed in 1934. *See supra* at V. In fact, Mr. Acord provided no testimony regarding *his* 1999 findings for any Hopkins boundary line other than the disputed Hopkins-Taylor/Chapman line, which he opined coincided with that shown on the Dunlap Survey commissioned by Respondent-plaintiff Chapman based on a stake Mr. Acord found during a survey for the Pecks in 1983. *Id.* This single conclusory statement cannot legitimately serve to establish Respondent's burden of proving Petitioner's senior deed boundary lines nor can it elevate the Dunlap Survey of the Respondent's junior deed to a survey of Petitioner's senior deed. Furthermore, Mr. Acord's "A, B, C" testimony, relied heavily upon by Judge Johnson, cannot even be reconciled with the Dunlap survey. For these reasons, Judge Johnson's survey findings are clearly erroneous and once again reflect an unfair bias.

- Regarding the critical issue as to whether Duffy Lane was altered in or prior to 1945 from a straight segment intersecting Route 19 to the curved layout shown in the 1945 aerial photo-

graph, Judge Johnson ruled that "Duffy Lane moved . . . [and] based most of that finding on Charlie Hinkle's testimony" because "Mr. Hinkle testified he's the one who moved the road," Judge Johnson further explaining that "Mr. Hinkle's testimony was very critical in my decision as to where to place Duffy Lane, the beginning of the survey." *See supra* at III. Judge Johnson made this ruling despite the fact that Mr. Hinkle had testified explicitly that he had moved to the relevant area after 1946 and did not know anything about Duffy Lane until after 1945. *Id.* Moreover, Mr. Hinkle was born in 1938 and could not have "moved the road" prior to the taking of the 1945 photograph as he was only six years old at that time. *Id.* Accordingly, Judge Johnson's Duffy Lane movement finding is clearly erroneous and with the fall of this finding, Duffy Lane "reverts" back to the curved layout shown in the 1945 aerial photograph, confirming the Schafer Survey and Petitioner Hopkins' position.

Through the above clearly erroneous rulings, the trial court corrected a fatal flaw in Respondent's case, resolved the key factual determination in Respondent's favor, and preserved for Respondent certain disputed area clearly used by Petitioner's business for at least twenty years. Given the inherent bias and prejudice reflected by the extreme measures taken by the trial court in its rulings, due process requires this Court's review to protect the property rights of Mr. Hopkins. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 476 (1993) (Justice O'Connor, dissenting) ("Fundamental fairness requires that impermissible influences such

as bias and prejudice be discovered nonetheless by inference if not by direct proof."). In view of the rulings made by the trial court, Petitioner Hopkins was denied the "[t]rial before 'an unbiased judge' . . . essential to due process" (*Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam)).

## III. JUDGE JOHNSON'S REVIEW OF HIS OWN CLEARLY ERRONEOUS FINDINGS DOES NOT SATISFY THE "MEANINGFUL" JUDICIAL REVIEW GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

"Procedural due process . . . requires . . . judicial review of the sufficiency of the evidence to sustain a civil jury verdict." *TXO Production Corp.*, 509 U.S. at 471 (Justice Scalia, concurring in judgment). "This Court's decision in *Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to discern impermissible influences and guarantee constitutional results." *TXO Production Corp.*, 509 U.S. at 501 (Justice O'Connor, dissenting); *see also*, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). Such procedures are to "'impose a sufficiently definite and meaningful constraint' on factfinder discretion." *TXO Production Corp.*, 509 U.S. at 471 (Justice O'Connor, dissenting (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)).

The verdict in the present case resulted from a bench trial with Judge Johnson functioning as the fact finder. The only judicial review of Petitioner's

allegations of clearly erroneous findings and abuse of discretion has been performed by the maker of the questioned rulings, Judge Johnson himself. Such a review cannot impose the "'sufficiently definite and meaningful constraint' on factfinder discretion" required by the Due Process Clause of the Fourteenth Amendment. Nor can it legitimately serve to "discern impermissible influences" on the factfinder thereby "guarantee[ing] constitutional results." Judge Johnson cannot serve as the factfinder and also be the beginning and the end of the judicial review constitutionally required by the Fourteenth Amendment.

## IV. THE WEST VIRGINIA SUPREME COURT OF APPEALS, DENYING PETITIONER HOPKINS' PETITION FOR REVIEW DESPITE JUDGE JOHNSON'S CLEARLY ERRONEOUS FINDINGS, FAILED TO ALLEVIATE THE DUE PROCESS VIOLATIONS.

No automatic appellate review exists in West Virginia. And, West Virginia has no intermediate appellate courts. In order to obtain appellate review, the losing party must first petition the West Virginia Supreme Court of Appeals for permission to appeal. *See* W. Va. R. App. P. 3. Only if the West Virginia Supreme Court of Appeals grants the petition will a full appeal follow. In September 2008, Petitioner Hopkins petitioned the West Virginia Supreme Court of Appeals for review of Judge Johnson's decision in the subject case. On February 26, 2009, without permitting Petitioner to orally present his petition despite his request to do so, and without

opinion, the West Virginia Supreme Court of Appeals denied the petition. Given the material and clearly erroneous rulings by the trial court (e.g., resolving the main factual dispute of whether the north edge of the Duffy Lane intersection had moved prior to 1945 by finding that Charlie Hinkle at age six had moved Duffy Lane), it is questionable whether the average West Virginian is afforded the judicial review required by the Due Process Clause of the Fourteenth Amendment. *TXO Production Corp.*, 509 U.S. at 471 (Justice Scalia, concurring in judgment) ("Procedural due process also requires, I am certain, judicial review of the sufficiency of the evidence to sustain a civil jury verdict..."). While the state of West Virginia provides for a petition for review, unless the provisions are applied to allow review *in every case warranting appeal*, the net effect is that these rights are denied. As Justice O'Connor explained in *TXO Production Corp.*

> [w]hile this Court has the ultimate power to interpret the Constitution, we grant review in only a small number of cases. We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights. But the state courts must do more than recite the constitutional rule. They also must apply it, faithful to its letter and cognizant of the principles underlying it.

*TXO Production Corp.*, 509 U. S. at 499. In the present case, for reasons unknown, the West Virginia Supreme Court of Appeals chose to forego its constitutional role as primary guarantor of federal rights. Accordingly, at this time, Petitioner Hopkins

has been denied both the "neutral and detached" judge and the judicial review safeguard required by the Due Process Clause of the Fourteenth Amendment. Only this Court remains to correct these constitutional violations and to protect future litigants from the same.[12]

## V. ABSENT INTERVENTION BY THIS COURT, PETITIONER HOPKINS IS VULNERABLE TO FURTHER ATTACKS REGARDING THE SAME BOUNDARY LINES AT ISSUE IN BOTH THE SUBJECT SUIT AND THE 2004 PECK SUIT

Nicholas County, West Virginia has only one circuit judge. Inherently then, attorneys will appear repeatedly before that judge on behalf of different clients potentially regarding the same or closely related issues. Accordingly, it is incumbent upon that single judge to ensure that a defendant is not subjected to attack in repeated litigation from opposite sides of the same issue (e.g., a boundary line does

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[12] The subject case presents this Court with the opportunity to analyze the controversial West Virginia court system. *See, e.g., Caperton v. A. T. Massey Coal Company*, No. 08-22 (U.S. filed Jul. 2, 2008); Adam Liptak, *U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System*, The New York Times, July 17, 2009 (http://www. nytimes.com/2008/10/12/washington/12scotus.html?pagewanted=print); Scott Finn, *WV Appeals Process In Crosshairs In Dupont Case*, WV Public Broadcasting, July 25, 2008, (http://www.wvpubcast.org/newsarticle .aspx?id=652); Jeremy Rosen, *Does West Virginia's Lack of a Right to Appeal a Punitive Damages Award Violate Due Process*, July 3, 2008 (http://calpunitives.blogspot.com/2008/07/does-west-viginias lack-of-right-to.html).

not shift depending on the plaintiff but resides in a single location).

Petitioner Hopkins has now been sued twice by opposing counsel Greg Sproles on behalf of different clients regarding the same Hopkins Tract boundary lines. Both suits have been pursued (within months of each other) before Judge Johnson, who has allowed counsel Sproles to argue opposing positions in the different suits resulting in the shifting of the Hopkins Tract Duffy Lane boundary line depending on which of Petitioner Hopkins boundary lines Mr. Sproles' current client adjoins (i.e., northward of Duffy Lane when representing the Pecks and southward encompassing Duffy Lane when representing Chapman). Despite the acquisition of multiple surveys of the Hopkins Tract obtained pursuant to Petitioner Hopkins' defense, and the burden of Respondent-plaintiff in the subject suit to establish Petitioner's boundary lines, neither suit has resulted in a judicial determination of the Hopkins Tract boundaries such that further litigation involving the Hopkins Tract is foreclosed. That is, the trial court's failure to adopt either of the complete surveys of the Hopkins senior deed leaves the Hopkins Tract subject to further litigation. Petitioner Hopkins, having endured the cost and strain of repeated litigation, is entitled to a final resolution of all of his boundary lines. Without the intervention of this Court, that resolution may never be afforded, and certainly cannot be without further litigation.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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***Counsel for Petitioner***

**IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA**

D.C. CHAPMAN VENTURES, INC.,
a West Virginia corporation,

Plaintiff,

v. Case No. 05-C-195

J.D HOPKINS,

Defendant.

**ORDER FOLLOWING BENCH TRIAL ESTABLISHING REAL ESTATE BOUNDARIES**

On the 19th and 20th days of September as well as the 10th, 11th, and 12th days of October, 2007, this action came for a trial before the Court without a jury, by stipulation and consent of the parties. The plaintiff, D.C. Chapman Ventures, Inc., appeared by its counsel, Gregory W. Sproles; and, the defendant, J.D. Hopkins, appeared in person and by counsel, Stephen E. Hastings.

GARY JARRELL
CIRCUIT CLERK
NICHOLAS COUNTY, WV
2007 DEC 5 PM 3:05

## Statement of the Case

The Complaint sets forth a claim by the plaintiff that the defendant, who owns property adjoining that of the plaintiff, committed acts of ownership on property owned by the plaintiff resulting in a trespass. Meanwhile the defendant contends he committed no trespass because he is the true owner of the property. As a result, both parties obtained surveys of their respective properties. In particular, the plaintiff obtained a survey from Craig Dunlap which plaintiff claims most accurately establishes the boundaries of the properties. Whereas, the defendant obtained two complete and one partial survey and claims that one of them, a survey completed by Kevin Schafer, more accurately sets the boundaries. Because none of the completed surveys precisely agree as to the location of the boundary between the parties, the plaintiff requested that the Court determine the true boundaries pursuant to WV Code 55-4-31. Further, no matter which survey the Court finds more reliable, the defendant claims also claims he has acquired title to, at least, a portion of the disputed property through adverse possession or, alternatively, by prescriptive easement. Both parties agreed to drop any damage claims against the other.

Evidence was presented by witness testimony and exhibits, and the Court heard the arguments of counsel. The Court has carefully considered the

evidence, the arguments or counsel, all papers of record, and pertinent legal authorities. As a result of these deliberations, the Court makes certain Findings of Fact and Conclusions of Law, set forth below.

## Findings of Fact

In consideration of all the evidence presented at trial, the Court hereby makes the following findings of fact:

1. Both the plaintiff's and defendant's tracts, whose boundaries are in dispute herein, are located in Summersville District, Nicholas County, West Virginia, and were once part of the same 372.5-acre tract acquired by James Craig and Joseph Alderson from Sarah A. Buster and Mary A. McGee by a deed dated August 1, 1911, and recorded in the Office of the Clerk of Nicholas County Deed Book 53, on page 148.

2. The defendant's approximately 24-acre tract (the "Hopkins Tract") first appeared in a deed (the "Snodgrass Deed") from Lillie Craig, et al. to Amanda Snodgrass dated February 2, 1934, and recorded in the Office of the Clerk of Nicholas County Deed Book 86, on page 499.

3. The defendant, through his business, Mountain State Motel, Inc., acquired the 24-

acre Hopkins Tract from W.B.Buskirk and Florence Buskirk, by deed dated April 26, 1965, and recorded in the Office of the Clerk of Nicholas County in Deed Book 210, on page 251. This deed contains the same description of the Hopkins Tract as in the 1934 Snodgrass Deed.

4. The defendant, J.D. Hopkins, personally acquired title to the Hopkins Tract from Mountain State Motel, Inc., by deed dated March 14, 1994, and recorded in the Office of the Clerk of Nicholas County in Deed Book 356, on page 695.

5. The plaintiff, D.C. Chapman Ventures, Inc., acquired its approximately 11-acre tract (the "Chapman Tract"), which adjoins much of the eastern boundary lines of the Hopkins Tract, from Judith A. Young, by deed dated November 17, 2006, and recorded in the Office of the Clerk of Nicholas County Deed Book 436, on page 313. the Chapman Tract was part of a tract that was owned by Gessie Mullins and adjoined the Hopkins Tract for many years. Judith A. Young was a Mullins prior to her marriage.

6. Also potentially affected by this boundary dispute is the Taylor property, which adjoins the southern boundary of the Chapman Tract

and the eastern boundary of the Hopkins Tract. The Taylor property consists of:

a. A 150-foot by 105-foot tract conveyed to Ben and Freda Taylor by deed from Sterling M. Craig, et al., dated August 17, 1946, and recorded in the Office of the Clerk of Nicholas County Deed Book 109, on page 294 (the "1946 Taylor Tract").

b. A 20-foot right of way (20-foot by 150-foot) located between the original 1946 Taylor Tract and the Hopkins Tract that was conveyed to Ben and Freda Taylor by deed dated April 19, 1968, and recorded in the Office of the Clerk of Nicholas County Deed Book 224, on page 616 (the "1968 Taylor Tract").

These are properties in which the defendant now claims a significant interest by virtue of the Schafer Survey, despite the 1946 Taylor Tract being conveyed by the Craig heirs who were also original grantors of defendant's 24-acre tract and the 1968 Taylor Tract being conveyed at the time the defendant was already in possession of his 24-acre tract.

7. Freda Taylor has lived on the Taylor property since 1946 and continues to reside there

today. Freda Taylor's son, Dewey Taylor, was born and lived in this area until he moved away in 1954. Since moving away, Dewey Taylor has visited his mother regularly at the Taylor property.

8. The conveyance of the 24-acre Hopkins Tract in the Snodgrass Deed of 1934 precedes any conveyance of the Chapman Tract, the 1946 Taylor Tract, or 1968 Taylor Tract.

9. The Hopkins Tract, as conveyed in the Snodgrass Deed of 1934, is more particularly bounded and described as follows:

> "Beginning at the north edge of the Duffy Lane on the line between the Duffy lands and the Craig lands, thence with the meanderings of the said lane, N. 85. 5 E. 170.5 feet; S. 82.5 E. 165 feet, S. 62.5 E. 95.7 feet S. 38 E. 79.2 feet, N. 79 E. 99 feet, S. 69.5 E. 49.5 feet to the Federal Road or Route No. 19; thence with said road or route N. 52 E. 635 feet to a stake 2.5 feet south-west from center of telephone pole; thence N. 35 W. 250 feet, S. 89 W.

275 feet; N. 18 W. 240 feet; N. 0°45' E. 256 feet; N. 31°45' W. 575 feet; N. 88.5 W. 250 feet to the line of the Duffy lands; thence with the line between Duffy and Craig S. 1 30' W. 1435 feet to the place of beginning, containing 24 acres and being part of the same tract of land conveyed to James S. Craig and Joseph A. Alderson by Sarah A. Buster by deed dated the 1st day of August, 1911, and recorded in the office of the Clerk of the County Court of said Nicholas County in Deed Book No. 53 at page 148."

10. Although the Hopkins Tract description in the Snodgrass Deed calls for following the Federal Route 19 (which is now W.Va. Route 41) for 635 feet from its intersection with the north side of Duffy Lane, this point of intersection has moved northward at last 60-80 feet along Route 41 since that 1934 conveyance.

11. In 1934, a telephone pole was located 2.5 feet from a "stake" marking the easternmost

corner of the Hopkins Tract, where it adjoins the 1968 Taylor Tract.

12. As early as 1946, fencing existed and functioned as a recognized property line on the boundary between the Hopkins Tract and the 1968 Taylor Tract.

13. The maps proffered from the West Virginia Department of Highways are inconclusive illustrations of the properties because they were not designed to reflect precise locations of roads and other monuments.

14. In 1999, the defendant requested Wayne Accord to complete a survey of the Hopkins Tract but, after receiving the preliminary findings, the defendant never requested that Mr. Acord complete the survey.

15. In May 2005, while considering the purchase of the Chapman Tract, the plaintiff, through its agent Craig Chapman, caused Craig Dunlap to complete a survey (the "Dunlap Survey") of the Chapman Tract and its adjoining properties.

16. In January 2006, the defendant caused Marshall Robinson to complete a survey (the "Robinson Survey") of the Hopkins Tract but the defendant did not agree with this survey.

17. In 2007, the defendant caused Kevin D. Schafer to complete a survey (the "Schafer Survey") of the Hopkins Tract.

18. Boundaries of the Hopkins Tract established by the Dunlap Survey agree with those established by Wayne Acord's preliminary survey of the Hopkins Tract.

19. Boundaries of the Hopkins Tract established by the Dunlap Survey agree with those established by a Wayne Acord's completed survey of the Hopkins Tract's adjoining property (the "Peck Tract") acquired by J.D. peck, by deed dated June 27, 1938, and recorded in Deed Book 94, on page 287.

20. The Dunlap Survey is the most reliable in establishing boundaries of the disputed properties.

21. Based on the boundary lines established by the Dunlap Survey, part of the defendant's motel, in particular a building referred to as the "40s Building," is situated on real estate that has been conveyed by deed to the plaintiff.

22. Sometime around 1985, the defendant caused the construction of a building, separate from his main motel building, in order to supply his motel business with additional rental units.

This additional building is referred to as the "40s Building" because it contains rooms that are numbered in the 40s.

23. Having caused the construction of the 40s Building sometime around 1985, the defendant has continuously used and maintained, for at least the last 10 years, the 40s Building as well as an area around the 40s Building, designated on the Dunlap Survey, and hereinafter referred to, as the "Encroachment Tract," which includes 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1). The defendant has not similarly used or maintained any other areas of real estate that he now claims.

24. Although the defendant and his family used additional areas of what is now the Chapman Tract, their use was limited to sporadic activities, including children's recreation, walking, riding motorcycles, and developing pathways. Further, other area children, including relatives of the predecessors in title to the Chapman Tract, the Mullins grandchildren, also used the same area for similar uses.

## DISCUSSION

### I. BOUNDARIES AS ESTABLISHED BY SURVEY

The boundaries at issue in this case are controlled by the description in the 1934 Snodgrass Deed, which originally conveyed the current Hopkins property. This deed calls for a 635-foot border along Federal Route 19 (now W.Va. Route 41) but there is a dispute among the surveyors as to where the 635-foot line begins. The primary reason for the dispute is that the Snodgrass Deed describes the beginning point o the survey as being at the north edge of Duffy Lane, which should seem simple enough. However, the north edge of Duffy Lane, as it existed in 1934, no longer exists today. In 1934, Duffy Lane was no more than a rutted wagon road. Over the years, Duffy Lane was significantly modified into a coal-hauling road used for transporting large amounts of coal mined from the area.

The Court must then consider circumstantial evidence to determine the starting point of the 1934 Snodgrass Deed survey, or the north edge of Duffy Lane, in order to determine the correct placement of the Hopkins Tract's 635-foot boundary line. The plaintiff contends that the north edge of Duffy Lane in 1934 was a significant distance from its present-day location. Whereas, the defendant contends that Duffy Lane has remained essentially unchanged since 1934. This discrepancy has resulted in

different surveyors placing the beginning of the Hopkins Tract's 635-foot boundary line at different locations. Although the evidence indicates an agreement between the Dunlap Survey and Mr. Acord's preliminary survey findings, each of the three completed surveys begin the 635-foot line at different locations along Route 41, resulting in corresponding discrepancies in other boundary liens, primarily along the Hopkins Tract's southern and eastern boundaries. As a result, the Court is faced with first distinguishing which, if any, of the surveys reliably establishes the disputed boundary lines.

In applying the law to the foregoing factual conclusions, the Court finds that the Dunlap Survey establishes the most reliable boundary points around the properties because the Dunlap Survey 1) accounts most reliably for the northward movement of Duffy Lane's intersection with Route 41 that occurred after the original conveyance of the Hopkins Tract in 1934, 2) fixes the location of a deed-reference corner stake and corresponding Hopkins-Taylor boundary line at locations most consistent with the evidence, and 3) fixes reasonable boundary lines that also agree with those established by Mr. Acord's preliminary survey findings.

As a threshold matter, the Court finds that the Hopkins Tract is more senior as it is the same tract whose original conveyance can be traced back to the 1934 Snodgrass Deed, which precedes any

conveyance of the Chapman or Taylor Tracts. The West Virginia Supreme Court has directed that "the liens of [a] senior grant should prevail over those of any junior grant." *Westover Volunteer Fire Dept. v. Barker*, 142 W.Va. 404, 419 (1957). Further, when establishing boundaries of property conveyed by deed, "the criterion for the construction of a deed is the intention of the parties." *Chapman v. Coal Co.*, 54 W.Va. 193, 199, 46 S. E. 262; *McDougal v. Musgrave*, 46 W.Va. 509. In fact, "[when] construing a deed, will or other written instrument, it is the duty of the Court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith." Syl. Pt. 1, *Maddy v Maddy*, 87 W.Va. 581 (1921). As a result, the boundaries at issue should be determined by establishing the overall intent found in the 1934 Snodgrass Deed, which first conveyed the more senior Hopkins Tract.

Further, the Court recognizes that, because this case is one of adjoiner and the defendant's source of title is senior to the grant under which plaintiff claims title, "it is necessary for plaintiff, in order to prevail, to establish the lines of the [more senior Hopkins Tract], which adjoin its lines at the points in controversy." *West Virginia Pulp & paper Co. v. J. Natwick & Co.* 123 W.Va. 753, 757 (1941). Thus, this case is "one in which plaintiff has the burden not only of proving title upon its own

strength but also by establishing defendant's adjoining lines." *Id.*

Unfortunately, as the sands of time slowly erode, so to do many of the monuments referenced in deeds, making it increasingly problematic to establish intended boundaries as more time passes. As a result, the law provides some guidance for establishing the boundaries intended by deed conveyances. In particular, the West Virginia Supreme Court has provided a general rule that "in locating boundaries of land, resort is to be had first to natural landmarks, next to artificial monuments, then to adjacent boundaries, and last to courses and distances." Syl. Pt. 1, *Matheny v. Allen*, 63 W.Va. 443 (1908). Courts have further specified, "Natural monuments include such natural objects as mountains, streams, rivers, creeks, and springs. [Whereas], artificial objects and monuments consist of marked liens, stakes, roads, fences, buildings, and similar matters marked or placed on the ground by the hand of man." 12 Am. Jur.2d, *Boundaries* §7 (2007).

In the instant case, the Snodgrass Deed contains the following description of the Hopkins Tract:

> "Beginning at the north edge of the Duffy Lane on the line between the Duffy lands and the Craig lands,

> thence with the meanderings of the said lane, N. 85. 5 E. 170.5 feet; S. 82.5 E. 165 feet, S. 62.5 E. 95.7 feet S. 38 E. 79.2 feet, N. 79 E. 99 feet, S. 69.5 E. 49.5 feet to the Federal Road or Route No. 19; thence with said road or route N. 52 E. 635 feet to a stake 2.5 feet south-west from center of telephone pole; thence N. 35 W. 250 feet, S. 89 W. 275 feet; N. 18 W. 240 feet; N. 0°45' E. 256 feet; N. 31°45' W. 575 feet; N. 88.5 W. 250 feet to the line of the Duffy lands; thence with the line between Duffy and Craig S. 1 30' W. 1435 feet to the place of beginning, containing 24 acres."

Although this description contains no natural monuments, it includes references to the following artificial monuments: 1) U.S. Route 19 (now W.Va. Route 41), 2) Duffy Lane, and 3) a "telephone pole" 2.5 feet from a stake. Although there was no dispute as to the location of Route 41, the precise locations of Duffy Lane and the telephone pole (or stake), at the

time of original 1934 conveyance, were points of strong contention at trial. In particular, the deed calls for measuring 635 feet beginning at the intersection of the north side of Duffy Lane with Route 41 (the "Duffy lane Intersection") and ending at the deed-referenced stake (the "Corner Stake"), which was intended to mark the southern corner of the Hopkins Tract where it adjoins the 1968 Taylor Tract. The point marked by the Corner Stake is also the southern end of the Hopkins Tract's coterminous boundary line with Chapman and Taylor, referenced as "Line 7" on the Schafer Survey and hereinafter referred to as the "Hopkins-Taylor Line." Because the Snodgrass Deed calls for measuring 635 feet between the Duffy Lane Intersection and the Corner Stake, and all three completed surveys fixed different locations for these two monuments, the Hopkins-Taylor Line was correspondingly shifted on each survey to different, essentially parallel, locations on the map. Thus, accurate determination of the disputed boundary lines largely depends on correctly identifying the locations of the Duffy Lane Intersection and the Corner Stake, as they existed in 1934.

In identifying the locations of these two monuments, the Court is mindful that "when the location of the natural objects, or the liens of a survey, called for, is doubtful or uncertain, resort may be had to extraneous or oral evidence, to show the actual intention of the parties, and that doubtful lines and corners must give way to the more certain

courses or monuments called for in the title papers." Syl.Pt. 2, *State v. Thompson*, 77 W.Va. 765 (1916). However, "only lost monuments may be proved by reputation and it is neither necessary nor proper to attempt to prove existing monuments in such manner." Syl.Pt. 6, *Blain v. Woods*, 145 W.Va. 297 (1960). In this case, the evidence indicates that the Corner Stake that existed in 1934 has been lost. Similarly, the evidence indicates that portions of Duffy Lane and, in particular, the Duffy Lane Intersection that existed in 1934 has also disappeared. As a result, the Court finds that it is appropriate to consider reputation and other evidence of the locations of these two monuments, as they existed in 1934.

### A. Duffy Lane's Post-1934 Northward Movement

First, the Court finds that the evidence of Duffy Lane's post-1934 northward alterations, particularly the northward movement of its intersection with Route 41, strongly supports the Dunlap Survey boundary points. The Dunlap Survey is the only completed survey presented that is consistent with the evidence that the mouth of Duffy Lane was moved at least 60-80 feet northward in the years since 1934. In contrast, the Robinson Survey fixes the intersection very close to its present day location and, correspondingly, the Hopkins-Taylor Line about 40 feet north of the Dunlap-established line. Moreover, the Schafer Survey

made absolutely no adjustment for any changes to the intersection and thereby fixes it at its present day location, correspondingly pushing the Hopkins-Taylor Line more than 90 feet north of the Dunlap-established line and well into the Taylor property.

Based on the following evidence found to be most credible, the Court finds that the plaintiff has sufficiently established that the Duffy Lane Intersection has moved at least 60-80 feet north, as indicated by the Dunlap Survey. First, evidence of this northward movement of Duffy Lane includes the testimony of several witnesses. Freda Taylor, who moved in 1946 with her family into the home in which she still resides on the adjoining Taylor Tract, testified that Duffy Lane and its intersection with Route 41 was moved north over the years to create an easier access onto Route 41 for coal trucks. Ms. Taylor testified that prior to being altered for the coal trucks, Duffy Lane "come straight up" the hill to Route 41 instead of making the present-day northward curve near its mouth, which now provides a much more gradual-grade entrance onto Route 41. This testimony was corroborated by Dewey Taylor, Ms. Taylor's son, who lived in the area since the 1930's and moved with his mother to the Taylor property in 1946.

Dewey Taylor provided credible testimony that prior to being altered by the coal operators around 1944 or 1945, Duffy Lane "went...pretty much straight up on the highway, a kind of steep

entrance onto the highway." In fact, Mr. Taylor testified that, after two separate periods of coal operations using Duffy Lane for trucking coal, the "whole road" changed, moving its entrance onto Route 41 approximately 60-80 feet north. Other area residents providing very similar testimony included Grace Wilmouth, Paul Querry, Alden Hudkins, and Charlie Hinkle. Mr. Hinkle, who once hauled coal out of Duffy lane, also testified that he had personally helped make the changes to Duffy Lane by performing work on the road's alterations. Mr. Hinkle further illustrated the significance of the changes by testifying that, prior to the changes, a truck driver pulling up to the Duffy Lane Intersection could see nothing but the tops of the trees straight ahead and could not see traffic coming from the left or right.

As for the opinions of the surveyors, Mr. Schafer's survey report indicates that he inquired as to a possible change in Duffy Lane and determined that its mouth "may have been altered to the north." Nevertheless, the Schafer Survey places the Duffy Lane Intersection in its present day location. Similarly, Mr. Robinson testified that if the location of the Duffy Lane Intersection had changed since 1934, then it would correspondingly change the lines on his survey. Of the surveys completed, only the Dunlap Survey agrees with the abundant evidence indicating that, as late as 1945, Duffy Lane traveled straight up the steep incline to intersect with Route 41, instead of taking the significant northward turn

as it does today. As a result, the Court finds that the reliability of the Dunlap Survey is strongly supported by its consistency with evidence of the post-1934 northward movement of the Duffy Lane Intersection.

### B. Location of the Corner Stake and Corresponding Hopkins-Taylor Line

Another critical survey point required to establish the disputed boundaries is the location of the previously described Corner Stake, which marks a corner of the Hopkins Tract and the southern end of the Hopkins-Taylor Line. According to the 1934 deed, the Corner Stake was one 2.5 feet from a telephone pole. Although there was no evidence suggesting that either the Corner Stake or telephone pole exist today, circumstantial evidence indicating the 1934 locations of these objects was consistent with the boundaries established by the Dunlap Survey. In particular, evidence of the Dunlap Survey's correctly establishing the 1934 location of the Corner Stake included 1) evidence of a fence line, long recognized as a property boundary, along the Dunlap-established Hopkins-Taylor Line, 2) evidence of a 1-inch pipe, or "stake," found at the corner of the 1946 Taylor Tract, 20 feet away from the line established by the fence, 3) testimony of the deed-referenced telephone pole's existence and location, and 4) evidence indicating the defendant's recognition, or at least acquiescence, of the Dunlap-established Hopkins-Taylor boundary line, including

his only recent claims of encroachment occurring on property openly used for decades by the Taylors.

First, a photograph, an iron pipe marker, and testimony by several witnesses indicated that a fence line long-existed starting from the location of the Corner Stake and traveling northwest along the Dunlap-established Hopkins-Taylor Line. The evidence showed that the Taylors purchased their first tract in 1946, which contained 150 feet of Route 41 frontage but left a 20-foot right of way between the 1946 Taylor Tract and the Hopkins Tract. Testimony indicated that, from 1946 to 1968, the 20-foot right of way was sometimes used by the Taylors for parking and sometimes by others as an access road to property located behind the Taylors. In 1965, the defendant's motel business purchased the Hopkins Tract. Thereafter, in 1968, the Taylors bought the 20-foot right of way, enlarging the width of their property to 170 feet and extending their property ownership to the boundary of the Hopkins Tract, in other words, the Hopkins-Taylor Line.

The existence of a fence, starting at the Corner Stake location and traveling northwest along the Dunlap-established Hopkins-Taylor Line, was first demonstrated through a photograph, clearly depicting the Taylor home and location of the nearby fencing. In addition, a 1 1/4-inch iron pipe was found in the ground along the line where the fence was shown to have stood. Although other surveyors found this pipe, only Mr. Dunlap completed a survey

recognizing it as a property line marker. However, Mr. Acord testified that in his preliminary survey he also identified the pipe as a property line marker and describing it as marking "an axial corner."

In addition to the photograph and pipe, the more credible witness testimony provided even further evidence of the existence, location, and boundary-marking intent of the fence. In particular, Freda Taylor persuasively testified that the fence was in place prior to her moving onto the tract in 1946. She testified that the fence line was intended to mark the boundary of the 20-foot right of way with the Hopkins Tract and remained in place "at least" from 1946 to 1965. Although the fence thereafter was periodically down. Ms. Taylor testified that, when the fence was up, its location remained the same. This testimony was corroborated by Dewey Taylor, who testified as having personal knowledge of the fence existing along the Dunlap-established Hopkins-Taylor Line, at least until he moved away in 1954. Thus, the Dunlap Survey's location of the Corner Stake is supported by the evidence of the fence line long exiting along a line extending from that location.

Second, Mr. Dunlap's location of the Corner Stake is also supported by evidence of a 1-inch iron pipe found in the ground 20 feet north of the Taylor fence line and marking the southern corner of the 1946 Taylor Tract. Recognition of the 1-inch iron pipe as marking the corner of the 1946 Taylor Tract

is consistent with evidence of a 20-foot right of way tract existing between the 1946 Taylor Tract and the Hopkins Tract. In fact, such a stake is called for in the 1946 Taylor Deed and Freda Taylor testified that, when she moved onto the tract in 1946, "[her] corner stake" was located in that same location at the southern corner of her property. Further, Ms. Taylor identified that the 1-inch iron pipe, or "stake," currently found on her property was placed there by another surveyor or engineer named Monty Craig, just prior to Ms. Taylor's moving onto the property, in order to mark the property line between her 150-foot wide tract and the 20-foot right of way. Although the existence of the stake is not determinative due to the seniority of the Hopkins Tract, it provides further circumstantial evidence of the accuracy of the Dunlap Survey over the other completed surveys that did not recognize this stake as a boundary marker.

Third, the Dunlap Survey's location of the Corner Stake is supported by evidence of the existence and location of the telephone pole referenced in the 1934 Snodgrass Deed. In particular, Dewey Taylor testified that, during the time he lived on the Taylor property (from 1946 to 1954), a telephone (or other utility) pole existence very near the end of the previously mentioned fence line. In fact, Mr. Taylor testified that the pole was "2 to 3 feet from the fence" and that "there was never a pole in [the Taylor's Route 41] frontage." This testimony is consistent with the Dunlap Survey's

placement of the Corner Stake near the end of the aforementioned fence line because the call in the Snodgrass Deed requires the Corner Stake to be "2.5 feet south-west from center of telephone pole." Thus, the testimony of the existence and location of the telephone pole provides further circumstantial support to the Dunlap Survey's placement of the Corner Stake.

Finally, the defendant's own behavior provides support to the location of the Corner Stake and corresponding Hopkins-Taylor Line as established by the Dunlap Survey. Although the defendant, or his company, has owned the Hopkins Tract since 1965, he only recently asserts his perceived property rights. If the location of the Corner Stake was established according to the Robinson Survey, the Hopkins-Taylor Line would be located about 40 feet north of its location on the Dunlap Survey, giving the defendant ownership of the entire 1968 Taylor Tract (the right of way) as well as about 20 more feet into the 1946 Taylor Tract. Moreover, if the location of the Corner Stake was established according to the Schafer Survey, as the defendant requests, the Hopkins-Taylor Line would be located more than 90 feet north of its Dunlap-established location, giving the defendant ownership of the entire 1946 Taylor Tract and more than 70 feet more, pushing the Hopkins-Taylor Line so far north that it would cut through the Taylor residence near its center, a structure which has stood for over 60 years. It is thereby revealing that

the defendant proclaims such an extensive and long-existing encroachment by the Taylors, yet has only recently asserted these property claims.

In fact, the defendant testified that, when his motel business acquired the Hopkins Tract in 1965, the Taylors were then using the 20-foot right of way, yet he took no legal action because "it was nothing to me...it wasn't my property, it was John Ireland's." Then, after the Taylors purchased the 20-foot tract in 1968, the defendant still took no legal action. The evidence further shows that the Taylors built a carport on the 20-foot tract as early as 1994, yet the defendant still took no legal action to assert rights over that property which he now claims to own. Despite the seniority and corresponding controlling intent of the Hopkins title, the defendant may not reach beyond the intent of his grant to acquire property rightfully owned by his neighbors.

Based on the foregoing, the Court finds that the Dunlap Survey most reliably establishes the location of the Corner Stake and corresponding Hopkins-Taylor Line. In fact, "in fixing the boundaries of land from title deeds, the lines calling for ascertained corners must be run thereto, though this may require a variation of both course and distance." Syl. Pt. 1, *Mays v. Hinchman*, 57 W.Va. 602 (1905). Based on the abundant evidence of the location of the Corner Stake, the Court finds its location has been sufficiently ascertained and is most accurately reflected by the Dunlap Survey.

Thus, even if the evidence had not adequately shown the northward movement of the Duffy Lane Intersection, the lines calling for ascertained corners, such as the Corner Stake location, must be run to even if it requires varying a course or distance called for within the controlling Snodgrass Deed. As a result of the overwhelming evidence establishing the location of the Corner Stake, the plaintiff has sufficiently shown that the Dunlap Survey most accurately establishes the corresponding location of the Hopkins-Taylor Line, as intended by the 1934 Snodgrass Deed.

### C. Surveyor Testimony Supporting the Dunlap Survey's Reasoning and Boundaries

Finally, the boundary lines established by the Dunlap Survey are further supported by the testimony of the four licensed surveyors involved. First, Mr. Dunlap supported his survey by testifying that his conclusions of Duffy Lane's northward alterations were based on his review of evidence including the relevant deeds, a 1913 topographical map, a 1945 aerial photo, road maps, as well as his locating a white oak stump called for at the mouth of Duffy Lane in the adjoining Peck Tract. Further, Mr. Dunlap testified that he placed significance on other monuments, such as the iron pipes found on the boundaries of the Taylor tracts, at least one of which was called for in the conveyance of the 1946 Taylor Tract. The Court is also persuaded by Mr. Dunlap's opinion testimony, corroborated by Mr.

Acord, that essentially uniform adjustments for secular change among all boundary lines, as Mr. Dunlap applied here, is generally required for the completion of an accurate survey. Finally, the credibility of Mr. Dunlap's conclusions are further supported by his testimony that he took "95 feet or so" from his client, Mr. Chapman, in order to ensure that the lines of the more senior Hopkins Tract were accurately followed.

On the other hand, Mr. Robinson testified that he did not adjust for secular change uniformly on all lines. Further, Mr. Robinson testified that "we knew [Duffy Lane] moved" but could not identify where it was moved. In fact, Mr. Robinson testified that if he knew for certain that Duffy Lane had moved since 1934, or that there had been a telephone pole at the end of the Taylor fence line, then it would change his survey lines. Finally, Mr. Robinson testified that after informing the defendant of his survey findings, the defendant expressed his disagreement with them and he "was adamant that no part of his boundaries be within his motel."

Next, Mr. Schafer's testimony indicated that he did not adjust for any secular change, despite his own testimony that a one degree adjustment is typically required for every 20 years that passes. Further, Mr. Schafer testified that he identified and followed the present-day "meanderings" of the north edge of Duffy Lane to its intersection with Route 41, without relying on any evidence of the road's

alterations or the courses and distances along Duffy Lane as called for in the 1934 Snodgrass Deed. In fact, Mr. Schafer testified that he did not investigate whether there had been any changes to Duffy Lane. In addition, Mr. Shafer testified that he placed no significance on the monuments located on the boundaries of the Taylor tracts. Further, Mr. Shafer testified that he significantly relied on a 1924 Department of Highways map. However, maps such as this one are inconclusive indicators of roads and their surrounding objects because they were designed simply for making road plans, which could have been altered after the map was made.

Further, Mr. Acord provided compelling testimony indicating that the boundaries of the Hopkins Tract established by the Dunlap Survey agree with those of his preliminary survey of the Hopkins Tract as well as his completed 1983 survey of the adjoining Peck Tract. Specifically, Mr. Acord testified that his surveys placed the Hopkins Tract boundaries "very close" to those established by Mr. Dunlap. Further, Mr. Acord agreed with Mr. Dunlap that adjustments for secular change should be made essentially uniform on all boundary lines. Moreover, Mr. Acord testified that, because of the strong evidence of the Duffy Lane changes, the only reliable deed-referenced monument in the Hopkins Tract description is the telephone pole, which he believed was reliably located by the testimony of Dewey Taylor. In addition, Mr. Acord testified that the pipe at the corner of the 1946 Taylor Tract was likely

placed accurately because it was placed by someone who had some technical knowledge and was also likely related to prior owners of the property, the Craigs.

Finally, Mr. Acord persuasively explained that his research indicated that the same heirs (the Craig heirs) conveyed the Hopkins Tract in 1934 and then, 12 years later, conveyed the 1946 Taylor Tract, while reserving the 20-foot right of way. Mr. Acord testified, and the Court agrees, that a landowner would not normally re-convey the same property they know to have been previously conveyed. Thus, it does not follow that the parties intended the Hopkins Tract to overlap any of the Taylor property.

Thus, the Court finds that the plaintiff has met their burden of proving the Dunlap Survey most accurately reflects the boundaries of the Hopkins Tract. In particular, the reliability of the Dunlap Survey is strongly supported by evidence of 1) the northward movement of the Duffy Lane Intersection, 2) the probable location of the Corner Stake, as referenced in the original Hopkins Tract conveyance of 1934, and 3) Mr. Dunlap's sound rationale for the boundaries he established, which also coincide with the opinion of another surveyor, Mr. Acord. Further, because the Dunlap Survey was demonstrated to be most reliable in establishing the aforementioned boundaries, the Court finds that the remaining boundary lines around the properties are similarly best established by the Dunlap Survey. Even though

this adoption of the Dunlap Survey results in a corresponding overlap in the area of the defendant's motel building, this result is unavoidable based on the abundance of evidence supporting the findings of the Dunlap Survey. In fact, at least one surveyor, Mr. Robinson, testified, "if you put the boundaries to agree with the [Taylor's] boundaries, you create an overlap on the hotel." Nevertheless, the Court finds that the evidence abundantly indicates that the Dunlap Survey most reliably establishes all of the deeded boundaries of the defendant's Hopkins Tract.

## II. ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENT

Having found that the Hopkins Tract boundaries are most reliably represented by the Dunlap Survey, the Court now addresses the defendant's alternative claims that he has established ownership over the disputed property based on either adverse possession or prescriptive easement. In particular, the defendant contends that these legal doctrines establish his ownership in certain land beyond the lines of the Dunlap Survey both around his motel's "40s Building" and around the northern boundaries of the Hopkins Tract, where it adjoins the Chapman Tract.

Addressing the area of the 40s Building first, the Court finds that the defendant has acquired title

to the land on which the 40s Building sits, as well as a certain encroaching area surrounding the 40s Building, based on meeting all the requirements for adverse possession. It is well settled in West Virginia that "W.Va. Code 55-2-1 ... gives a person ten years to assert his ownership to land." *Naab v. Nolan*, 174 W.Va. 390, 392 (1985). In fact, this statute accomplishes the doctrine of adverse possession which "enables one who has been in possession of a piece of real property for more than ten years to bring an action asserting that he is now the owner of that piece of property even when the title rests in another." *Id.*

In particular, "one who seeks to assert title to a tract of land under the doctrine of adverse possession must prove each of the following elements for the requisite statutory period: (1) That he has held the tract adversely or hostilely; (2) That the possession has been actual; (3) That it has been open and notorious (sometimes state din the cases as visible and notorious); (4) That possession has been exclusive; (5) That possession has been continuous; (6) That possession has been under claim of title or color of title." Syl. Pt. 3, *Somon v. Murphy Fabrication and Erection Co.*, 160 W.Va. 84 (1977). However, "occasional and sporadic acts of dominion tending to show possession of land, which are not continuous for the statutory period, do not constitute adverse possession as is contemplated by law." Syl. Pt. 8, *Westover Volunteer Fire Dept. v. Barker*, 142 W.Va. 404 (1956). F-rther, "the burden is upon the

party who claims title by adverse possession to prove by clear and convincing evidence all elements essential to such title." Syl. Pt. 2, *Brown v. Gobble*, 196 W.Va. 559 (1996).

In applying the law to the facts of this case, the court notes it is faced with a situation similar to the one seen in *Naab*, where a driveway and small garage existed for a generation before ejectment was sought. See *Naab v. Nolan*, 174 W.Va. 390 (1985). Similarly in this case, a motel structure (the 40s Building) and the below-described "Encroachment Tract," which was used in connection with motel business, has existed for decades before any complaint was made that it encroached on another's property. In particular, the evidence sufficiently demonstrated the defendant's adverse possession not only of the 40s Building but also of certain land surrounding the 40s Building, designated on the Dunlap Survey and hereinafter referred to as the "Encroachment Tract," which includes 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as drawn on the Dunlap Survey (Plaintiff's Exhibit Number 1). The existence and use of the Encroachment Tract was established by testimony and photographic evidence including a home video taken in 1994. Specifically, the video depicted an area the size of a single lane roadway, or about 10 feet wide, on the ease side of the 40s Building leading toward the rear of the building. Although

the defendant claimed adverse possession of an even larger area, the evidence did not clearly and convincingly support his contention. In addition to the video and photographic evidence, a nearby landowner, Doug Vincent, credibly testified that, as early as 2004, the evidence around the 40s Building was "grown up" with dense brush except for "about 10-15 feet" off of the building. Craig Chapman convincingly corroborated this testimony by indicating he made similar observations when he first viewed the property around that same timeframe.

As for establishing the elements of adverse possession to the land under the 40s Building and the surrounding Encroachment Tract, similarly to *Naab*, the first element of holding the problem hostile or adverse to the true owner is unquestionably present in this case because the Dunlap Survey clearly indicates that the defendant's motel occupies a portion of the plaintiff's tract. Further, the defendant was likely aware of this fact because he was informed, at least by Mr. Robinson and Mr. Acord, that their survey findings indicated the 40s Building encroached onto the Chapman Tract. As the *Naab* Court noted, "such physical dominion is sufficient to satisfy the first adverse or hostile element." *Id.* At 392. In addition, "this same fact of exercising physical dominion over a portion of the [property] satisfies the second requirement that the possession be action." *Id.*

Next, the third element, that possession be open and notorious, requires that the acts asserting dominion over the property "must be of such a quality to put a person of ordinary prudence on notice of the fact that the disseisor is claiming the land as his own." *Id.* This element is clearly met by the open nature that the motel conducted its business in and around the 40s Building over the years. Fourth, the adverse claimant's use of the property must be "exclusive" in that it "need be the type of possession that would characterize an owner's use." *Id.* This requirement is also met in this case because the evidence does not indicate that anyone else but the defendant and his motel business ever performed acts of ownership of the 40s Building or its surrounding Encroachment Tract.

Fifth, the possession must be "continuous," in that "the evidence shows continuous possession by one asserting adverse possession for the statutory period of ten years." *Id.* This element is also met because it is uncontroverted that the defendant or his motel business has occupied the 40s Building since around 1985. Finally, the sixth adverse possession requirement of entering the subject property upon claim of right or color of title has also been met. The *Naab* Court held that "a claim of title is generally nothing more than the disseisor's entering upon the land with the intent to claim it as his own." *Id.* The defendant fulfilled this requirement when he proceeded as if he had title to that portion of the Chapman Tract upon which the

40's Building is located. As in *Naab*, no permission was either asserted or proved. Thus, by clearly and convincingly meeting all six requirements, the defendant has acquired title to the land on which the 40s Building sits as well as the surrounding Encroachment Tract by adverse possession.

However, the defendant failed to establish, by adverse possession or prescriptive easement, ownership of any additional property, including any area around the northern boundaries of the Hopkins Tracts, which he now claims. First, the defendant has failed to provide clear and convincing evidence of any additional adverse possession. Although there was some contradicting evidence as to the nature and extent of the defendant's use of a pathway and other property around his Hopkins Tract's northern boundaries, the evidence only indicated that the defendant and his family used the areas for walking, children's recreation, riding motorcycles, an developing pathways. However, the evidence similarly indicated that the area children, including the grandchildren of predecessors in title to the Chapman Tract, also used the same area for similar uses. In particular, David Hopkins testified that the Mullins grandchildren also used the property for similar sporadic and recreational activities.

The Court finds that sporadic recreational use in common with adjoining owners is neither continuous nor an indicator of ownership that would put an owner on notice of another's adverse claim of

title. Further, since the finding of adverse possession is largely fact driven, the Court must assess the credibility of the defendant's evidence. To this end, the Court finds that the evidence strongly supports the defendant's adverse possession of the 40s Building and the Encroachment Tract but there was not enough credible evidence to further extend the adversely possessed area. In other words, the defendant failed to clearly and convincingly demonstrate that his use of any area other than that of the 40s Building and the Encroachment Tract was sufficiently exclusive, open and notorious to establish title by adverse possession.

Similarly, the defendant failed to establish any prescriptive use of any additional real estate. Although adverse possession involves the adverse taking of title to real estate depriving the prior owner of all his interest in that property, "the acquisition of a prescriptive easement affords the person who acquires the easement the use of another's property in a limited way. It does not deprive the owner of the property of all his interest in it. He still owns the property, subject only to the requirement that he not use it so as to deprive, or interfere with, the easement owner's enjoyment of the easement." *Moran v. Edman,* 194 W.Va. 342, 347 (1995). To establish an easement by prescription, the West Virginia Supreme Court has directed that "the open, continuous and uninterrupted use of a road over the lands of another, under bona fide claim of right, and without

objection from the owner, for a period of ten years, creates in the use of such road a right by prescription to the continued use thereof." Syl. Pt. 3, *Grist Lumber, Inc. v. Brown*, 209 W. Va. 530 (2001). By requiring the additional elements of hostile and exclusive possession of another's property, "a greater showing must be made to establish adverse possession than is necessary to establish a prescriptive easement." *Moran v. Edman*, 194 W. Va. 342, 347 (1995).

However, the defendant even falls short of prescriptive easement's lighter evidentiary burden by failing to show clear and convincing evidence of "open, continuous, and uninterrupted use" of any property beyond the Dunlap-established boundaries and previously described Encroachment Tract. The evidence indicates only that the defendant and his family used certain areas near the defendant's northern boundaries for walking, children's recreation, riding motorcycles, and developing pathways. But, as stated above, these activities were sporadic and similarly conducted by other area residents. Thus, such activities are not the continuous an uninterrupted types of use required to establish a prescriptive easement. Accordingly, the defendant failed to clearly and convincingly demonstrate that his use of any area other than that of the 40s Building and Encroachment Tract was sufficient to establish any rights to use or ownership in him by either prescriptive easement or adverse possession.

The Court would therefore conclude as a matter of law that:

1. The plaintiff has not shown by a preponderance of the evidence that the boundaries of the Hopkins Tract are best established by the Dunlap Survey.

2. The defendant has shown by clear and convincing evidence adverse possession of the land on which the 40s Building sits and the Encroachment Tract around it.

3. The defendant has failed to show by clear and convincing evidence adverse possession of any additional area around the Hopkins Tract's northern boundaries or any other area except the 40s Building and it surrounding Encroachment Tract.

4. The defendant has failed to show by clear and convincing evidence any prescriptive easement over the areas around the northern boundaries of the Hopkins Tract or any other area except the 40s Building and its surrounding Encroachment Tract.

Accordingly, based upon the above findings of fact and conclusions of law, the Court does hereby **ORDER:**

1. The boundaries of the Hopkins Tract shall follow the boundary lines established by the Dunlap Survey, except for the land described below to which the defendant has acquired title by adverse possession.

2. Based on his clearly and convincingly establishing all the legal requirements of adverse possession, the defendant shall have title to the land on which the 40s Building currently sits, as well as an area around the 40s Building, designated on the Dunlap Survey as the "Encroachment Tract" and including 1) A ten (10) foot perimeter of land immediately surrounding all encroaching sides of the 40s Building and 2) the land west of the Encroachment Tract's eastern boundary line, as draw on the Dunlap Survey (Plaintiff's Exhibit Number 1).

3. The defendant shall submit a survey to the Court within 30 days reflecting the boundaries of the land he has obtained by adverse possession for the purpose of recording it with the County Clerk of Nicholas County.

4. It is further **ORDERED** that the Clerk of this Court shall prepare and forward certified copies of this order to Gregory W. Sproles, Esq., 509 Church Street, Summersville, WV

26651 and Stephen E. Hastings, Esq., P.O. Box 11070, Charleston, WV 25339.

ENTERED this *5th* day of *December*,

2007.

*/s/ Gary L. Johnson*
Hon. GARY L. JOHNSON,
Circuit Judge

A true copy, certified this
5th day of December, 2007
*/s/ Gary Jarrell*
Gary Jarrell, CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26551
By */s/ LH*, Deputy
[seal]

**IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA**

**DC CHAPMAN VENTURES, INC.,**
**a West Virginia corporation,**

**Plaintiffs/Petitioners,**

**v.** **Civil Action No. 05-C-195**
**(Hon. Gary L. Johnson)**

**J.D HOPKINS, individually, and**
**DAVID HOPKINS, individually,**

**Defendants/Respondents.**

**ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION TO ALTER OR AMEND JUDGMENT OR MAKE ADDITIONAL FINDINGS OF FACT AND ORDER REFLECTING RULINGS ON OTHER POST TRIAL MOTIONS**

GARY JARRELL
CIRCUIT CLERK
NICHOLAS COUNTY, WV
2008 MAY 19 PM 2:56
CIVIL ORDER BOOK *153* PAGE *397*
ENTERED *5-19-06*

On the 19th day of February, 2008 came the Plaintiff, by counsel, Gregory W. Sproles, and D. Craig Chapman and came Defendant, J.D. Hopkins in person and by counsel, Stephen E. Hastings, for a hearing upon various post trial motions. Pursuant to the rulings and associated rationale of the Court during the February 19, 2008 hearing, the Court hereby ORDERS:

(1) Defendant's Motion to Exceed the Page Limit for Motions and Memorandums is GRANTED;

(2) Defendant's Motion for a New Trial or in the Alterative, the Motion to Alter or Amend Judgment or Make Additional Findings of Fact is DENIED;

(3) Plaintiff's Motion To Strike Attachments To Motion And Memorandum For New Trial is GRANTED-IN-PART and DENIED-IN-PART; and,

(4) Defendant's Motion for Clarification of Order is GRANTED and, by way of further clarification, the Court FINDS that the subject boundary line segment is contained within the encroachment area which is generally reflected on the attached partial blowup of Plaintiff's Exhibit 1 which is attached to this Order as Exhibit A and described more specifically in the transcript of the February

19, 2008 proceedings herein, the original of which is contained within the Court file of this matter.

The Court further addressed during the February 19, 2008 hearing a Motion to Strike certain testimony of David Hopkins which occurred during the course of the trial. The Court clarified its ruling relating to such testimony by announcing that the Motion to Strike related only to things that Butch Mullins would have been aware of during his lifetime. The remainder of the testimony of David Hopkins was not stricken.

The Court does hereby further Order that any additional findings of fact and conclusions of law are contained more specifically in the transcript of the February 19, 2008 proceedings herein.

The Plaintiff's and Defendant's objections and exceptions are hereby reserved.

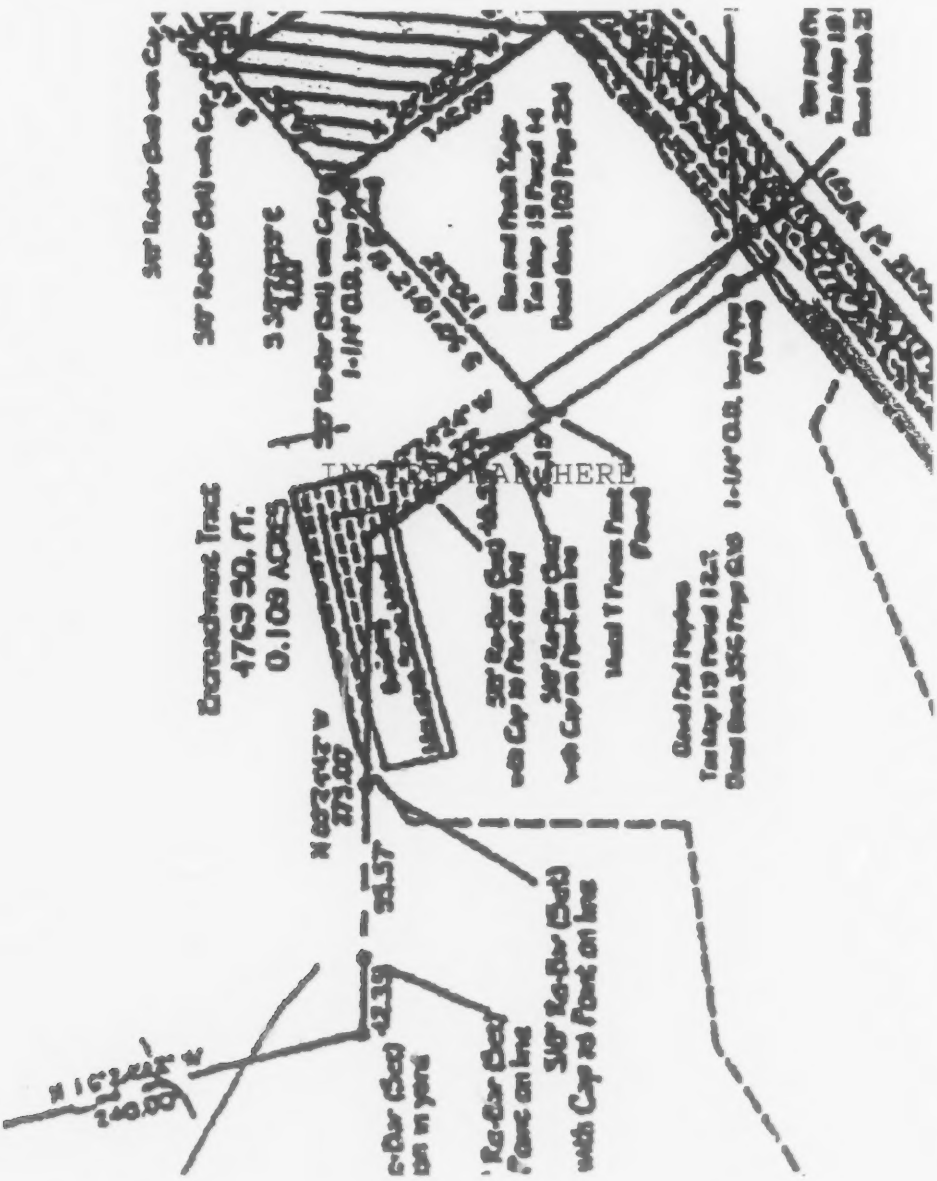
The Court further ORDERS the Circuit Clerk to forward a certified copy of this Order to all counsel of record.

ENTERED: *5-19-08*

*/s/ Gary L. Johnson*
**GARY L. JOHNSON, JUDGE**

A true copy, certified this
*19th* day of *May, 2008*
*/s/ Gary Jarrell*
Gary Jarrell, CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651
By *D. Facemire*, Deputy

CIVIL ORDER BOOK *153* PAGE *398*
ENTERED *5-19-08*






BEST AVAILABLE COPY

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th of February, 2009, the following order was made and entered:

D.C. Chapman Ventures, Inc., a West Virginia corporation, Plaintiff Below, Respondent

vs.) No. 082078

J.D. Hopkins, Defendant Below, Petitioner

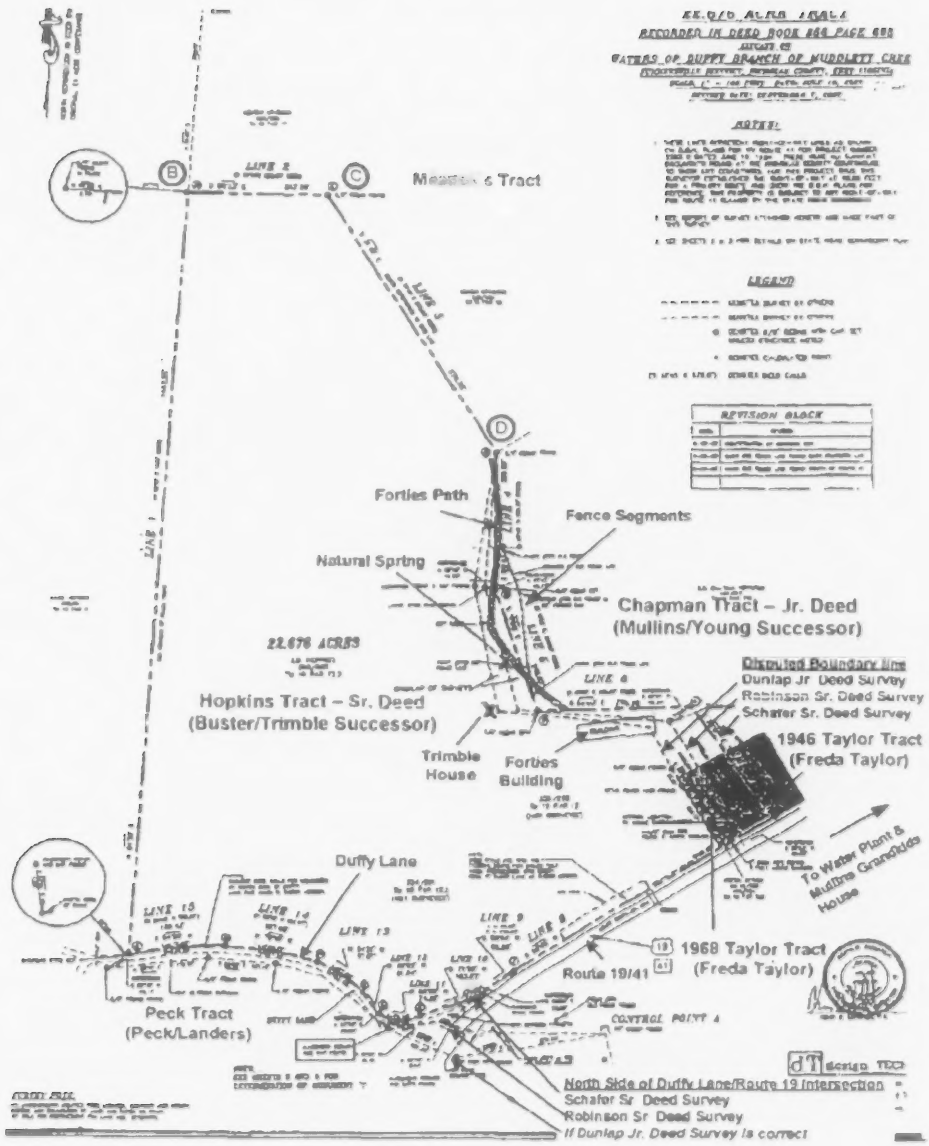
On a former day, to-wit, October 28, 2008, came the petitioner, J.D. Hopkins, by Stephen E. Hastings, Hendrickson & Long, P.L.L.C., his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Nicholas County, rendered on the 19th day of May, 2008, with the record accompanying the petition. On October 17, 2008, came the respondent, DC Chapman Ventures, Inc., by Gregory W. Sproles, Breckinridge Davis Sproles & Chapman, PLLC, its attorney, and presented to the Court its written response thereto.

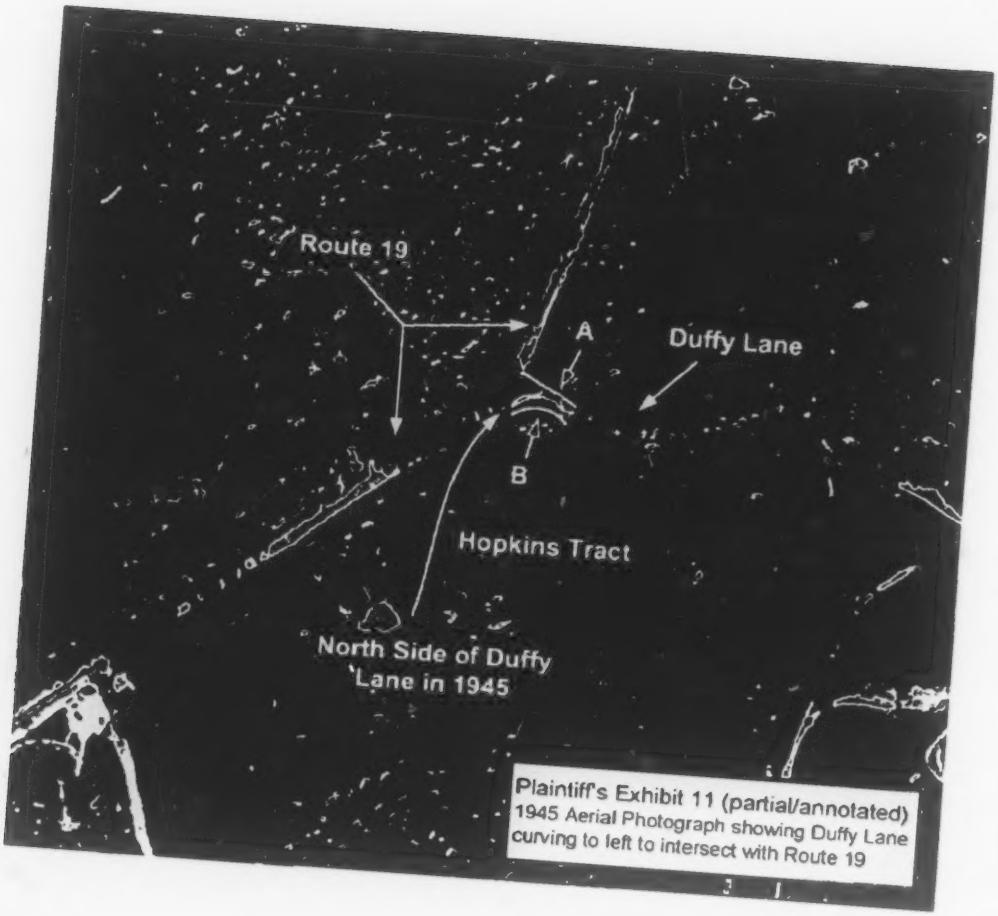
Upon consideration whereof, the Court is of the opinion to and doth hereby refuse said petition for appeal. Justice Albright did not participate in the consideration or decision of this matter. Senior

Status Justice McHugh sitting by temporary assignment.

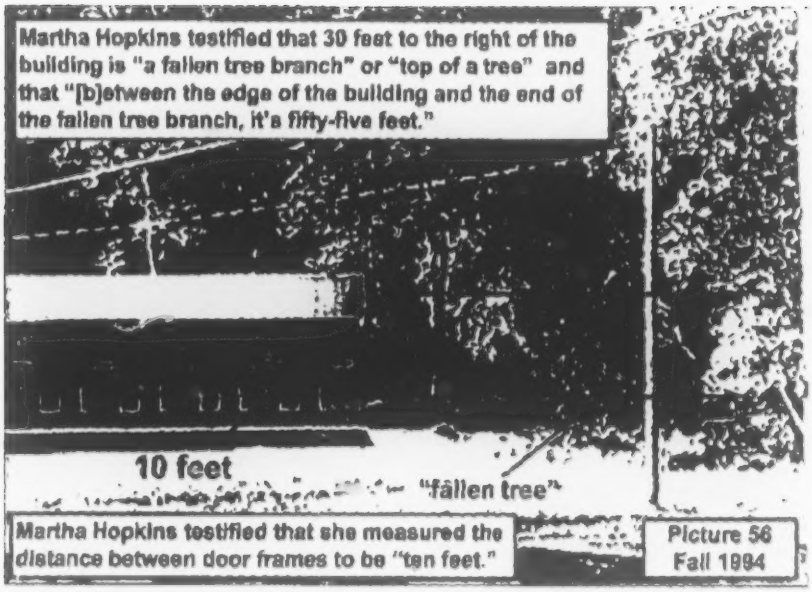
A True Copy

Attest: _____*/s/ Rory L. Perry, II*_____
Clerk, Supreme Court of Appeals

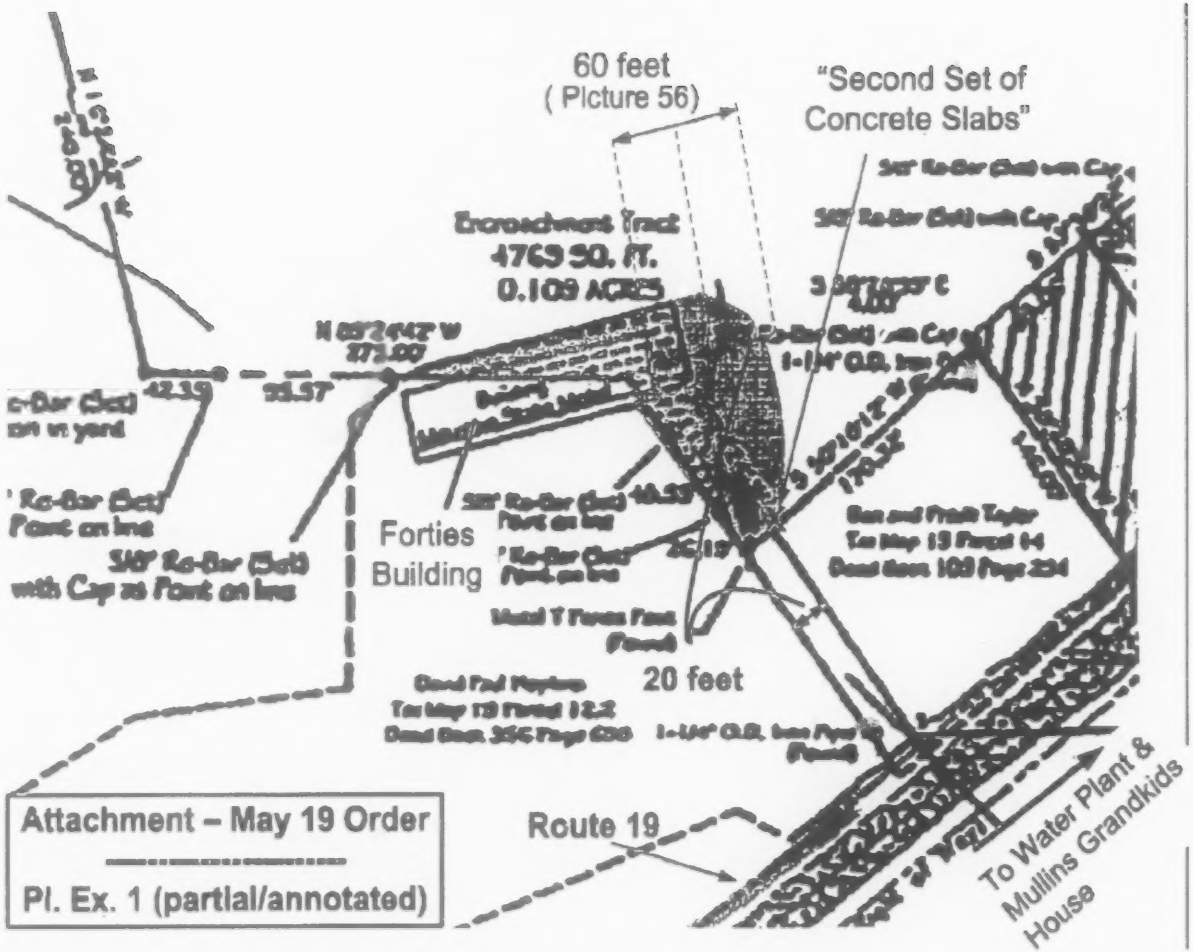

Meaders Tract
Forties Path
Fence Segments
Natural Spring
Chapman Tract – Jr. Deed
(Mullins/Young Successor)
22.676 ACRES
Hopkins Tract – Sr. Deed
(Buster/Trimble Successor)
Disputed Boundary line
Dunlap Jr Deed Survey
Robinson Sr. Deed Survey
Schafer Sr. Deed Survey
1946 Taylor Tract
(Freda Taylor)
Trimble House
Forbes Building
Duffy Lane
To Water Plant & Mullins Grandkids House
1968 Taylor Tract
(Freda Taylor)
Route 19/41
Peck Tract
(Peck/Landers)
North Side of Duffy Lane/Route 19 Intersection
Schafer Sr Deed Survey
Robinson Sr Deed Survey
If Dunlap Jr. Deed Survey is correct




Plaintiff's Exhibit 11 (partial/annotated)
1945 Aerial Photograph showing Duffy Lane
curving to left to intersect with Route 19


Martha Hopkins testified that 30 feet to the right of the building is "a fallen tree branch" or "top of a tree" and that "[b]etween the edge of the building and the end of the fallen tree branch, it's fifty-five feet."
10 feet
"fallen tree"
Martha Hopkins testified that she measured the distance between door frames to be "ten feet."
Picture 56
Fall 1994

60 feet
Martha Hopkins testified that she measured the distance between door frames to be "ten feet."
Picture 76
September 2007


60 feet
( Picture 56)
"Second Set of
Concrete Slabs"
Encroachment Tract
4769 SQ. FT.
0.109 ACRES
Forties
Building
20 feet
Route 19
To Water Plant &
Mullins Grandkids
House
Attachment – May 19 Order
Pl. Ex. 1 (partial/annotated)